Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID A. SHALLER, M.D.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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93 pp

QUESTION PRESENTED

Congress *found* [Appendix F. 58a-60a]:

(1) Plaintiff was fired in retaliation for whistleblowing.

(2) The Department of Veterans Affairs' (DVA) policy is to "harass and/or fire whistleblowers."

(3) ". . . that in light of the failure of the DVA quality assurance system to prevent and correct poor medical treatment, the Department's punishment of personnel who attempt to expose poor quality care closes out the last possible mechanism within the hospital system to address problems."

Concurrent with the DVA's policy are rising malpractice and malpractice claims paid. [footnote #8 p. 9, #13 p 12]

Congress provided physicians with statutory judicial review, 38 U.S.C. § 7462(f)(1), because of the DVA's policy. *The courts nullified Congress' intent and the law.* By judicial legerdemain, the courts *unlawfully* dismissed Plaintiff's case, finding "no subject matter jurisdiction". There was no adjudication on merit.

Will The Supreme Court respect Congress' intent and the law by exercising its supervisory authority, and *permit Plaintiff judicial review per referenced statute*, to correct the agency's manifest violation of public policy and the miscarriage of justice to Plaintiff?

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OPINIONS BELOW

The District Court found joint subject matter jurisdiction with the U.S. Court of Federal Claims, but lacked jurisdiction for Tucker claims more than $10,000.00. It found no merit to defendant's issue of *res judicata* and failure to state a claim. (p. 52a, footnote #6). Feb. 26, 1997. [Appendix E, 49a-57a]

The District Court and both parties Stipulated transfer "in its entirety" to the U.S. Court of Claims, pursuant to 28 U.S.C. § 1491(a). The Tucker Act. June 6, 1997. [Appendix D, 47a-48a]

Unpublished Decision by the U.S. Court of Federal Claims dismissed for lack of subject matter jurisdiction June 28, 2002. [Appendix C, 12a-46a].

The United States Court of Appeals for the Federal Circuit affirmed. February 5, 2003. [Appendix B, 3a-11a]

Combined Petitions for rehearing and rehearing en banc were denied. April 15, 2003. [Appendix A, 1a-2a]

JURISDICTION

The Court of Appeals Order was entered on April 15, 2003.

The jurisdiction of District Court was invoked under 38 U.S.C. § *et seq*, ["relevant Department of Veterans Affairs (DVA) employment regulations as set forth in the United States Code and internal DVA procedures including. . ."] grievance procedure § 4110 was repealed, recodified under § 7461 *et seq*. (see footnote #5, Appendix p. 52a), judicial review now under § 7462(f)(1) (see footnote #8, Appendix p. 52a), with pay statutes § 7404, § 7431-33, § 7438, the Administrative Procedures Act, 5 U.S.C. § 701 *et seq*., 28 U.S.C. § 1346(a)(2) [Little Tucker Act].

The District Court Stipulation transferred the case "in its entirety" to the United States Court of Claims [pursuant to] and invoked 28 U.S.C. § 1491(a) [the Tucker Act] and invoked the above.

The jurisdiction of the U.S. Court of Federal Claims was invoked under the above and found "Plaintiff Presents a Cognizable Back Pay Act Claim", 5 U.S.C. § 5596(b) [Appendix p. 38a].

The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. 1295(a)(3).

The jurisdiction of This Court was invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. § 1491 (a)(1) provides in pertinent part:

> "The United States C'aims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . As we explained in *United States v Testan*, 424 U.S. 392,398 (1976), the Tucker Act created jurisdiction in the Court of Claims to consider certain claims against the United States whenever a substantive right existed. The Back Pay Act supplies the substantive right to recover backpay whenever an employee is affected by an unjustified or unwarranted personnel action which leads to the withdrawal or reduction of pay and allowances. (Verbatim from *United States v Fausto*, 484 U.S. 439 (1988).

The Back Pay Act, 5 U.S.C. § 5596(b), provides in pertinent part:

> "An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—" (A) is entitled on correction of the personnel action, to receive for the period for which the personnel action was in effect—[an amount equal to back pay (less any amount earned through other employment) and reasonable attorney fees]." (Verbatim from *United States v Fausto*, 484 U.S. 439 (1988).

38 U.S.C. *et seq.*, Department of Veterans Affairs Health-Care Personnel Act of 1991. [Amends Title 38 U.S.C.]: Public Law 102-40. May 7, 1991. Provides in pertinent part:

> 38 U.S.C. § 7461 *et seq.* Disciplinary and grievance procedures: Adverse actions:
>
> 38 U.S.C. § 7461(2) Defines "Major" Adverse Actions:
>
> (A) Suspension.
>
> (B) Transfer.
>
> (C) Reduction in grade.
>
> (D) Reduction in basic pay.
>
> (E) Discharge.

38 U.S.C. § 7462 provides judicial review for "Major" adverse actions:

> 38 U.S.C. § 7462(f)(1) A section 7401 employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision.
>
> 38 U.S.C. § 7462(2)(A)(B)(C) In any case in which judicial review is sought under this sub-section, the court shall review the record and hold unlawful and set aside any agency action, finding, or conclusion, found to be—
>
> (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) Obtained without procedures required by law, rule or regulation having been followed; or
>
> (C) Unsupported by substantial evidence.

38 U.S.C. "Money-mandating" statutes are under:

> 38 U.S.C. § 7404. Grades and pay scales.
>
> 38 U.S.C. § 7431-33 and § 7438. Special pay authority.

38 U.S.C. Relevant Department Of Veterans Affairs Regulations:

> MP-1, Part I, Chapter 2, VA Investigation Policy; the Inspector General Act of 1978: Department of Medicine and Surgery's Administration Letter, IL 13-82-8, SUBJ: Administrative Investigations; MP-1, Part I, Chapter 15, Office of Inspector General Complaint Center; Department of Medicine and Surgery's Security guide for Conducting Administrative Investigations, dated August 20, 1988, Section 1.450-1.455 of Title 38, Code of Federal Regulations; and of the Department policies for Disciplinary Actions, Grievances and Hearings, MP-5, Part II.

The Administrative Procedures Act 5 U.S.C. § 701 *et seq.* provides in pertinent part:

> 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

The Privacy Act 5 U.S.C. § 552a.(b)(8) and (b)(9) permit disclosure as provided in pertinent part:

> (b)(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual:

(b)(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee:

STATEMENT OF THE CASE

Plaintiff, a physician was fired by the Department of Veterans Affairs (DVA) in retaliation for whistleblowing.[1] He seeks judicial review and filed a claim for reinstatement and back pay pursuant to the Tucker Act, 28 U.S.C. § 1491, Back Pay Act, 5 U.S.C. § 5596, Department of Veterans Affairs Health-Care Personnel Act of 1991, 38 U.S.C. § *et seq.*, [grievance procedure under § 7461; judicial review under § 7462(f)(1) and (2)(A)(B)(C): "money-mandating" statutes under section § 7404 (Grades and pay scales), section § 7431-33 and § 7438 (Special pay authority)], the Administrative Procedures Act, 5 U.S.C. § 701 *et. seq.*, and as a Matter of Public Policy. The case was dismissed for lack of jurisdiction.

BACKGROUND

On December 7, 1983, Plaintiff began employment at the Veterans Hospital in Wilkes-Barre, Pennsylvania, as Chief of the Rheumatology Section. One year later, in addition to Rheumatology Chief, he was appointed Chief Physician of the Hospital's Nursing Home Care Unit (NHCU).

In 1988, the DVA instituted monetary incentives for hospital administrators to improve efficiency. Shortly thereafter, administrators began intervening in patient care with disastrous results, patients were harmed and died. Plaintiff did not permit this to happen to his patients,[2] and

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[1] U.S. Congress House Report 102-1062. November 9, 1992. Findings: "The DVA discourages the reporting of poor quality care by harassing whistleblowers or firing them." [Appendix-II: The U.S. Court of Appeals For The Federal Circuit]. (Appendix-F, 58a-60a)

[2] An administrator arranged the transfer of a paralyzed ventilator dependent patient to the Nursing Home Care Unit (NHCU), without

complained vigorously. A letter of complaint to the Office of Inspector General (OIG) dated December 30, 1988 caused his firing on January 17, 1991.

* * * *

Plaintiff's firing in retaliation for whistleblowing is a *finding of fact*[1] established by the U.S. Congress after a thorough investigation culminating in public hearings on November 20 and 21, 1991. The hearings compelled sworn testimony from the DVA's Secretary, Inspector General and Medical Director, and all failed to refute Plaintiff's sworn testimony.[3]

Plaintiff reported mismanagement, negligence, and malpractice including deaths to appropriate DVA officials, who engaged in a cover-up. He then reported to the OIG, which failed to investigate.

In one letter to the OIG, Plaintiff evidenced individual veterans who were mistreated and inadvertently released patient identifying data. Upon learning of Plaintiff's actions, the patients or surviving widows willingly consented to Plaintiff's release, and expressed their gratitude to Plaintiff for taking their case to Washington, DC for the sole purpose of providing them proper medical care.

Plaintiff's knowledge or approval. The patient came from the acute pulmonary ward, tethered to the ventilator. Transferring a patient from an acute ward demonstrates "efficiency", because care "costs less" in the NHCU. However, the NHCU nurses were not trained in ventilators and respiratory therapy services were not available in the NHCU. Plaintiff learned of the transfer shortly after its completion. When attempts to reverse it were unsuccessful, he was compelled to call Headquarters in Washington, DC. The patient survived and was transferred back within the hour. Other patients not subject to Plaintiff's oversight were not so fortunate and died. Substantial tort claims were paid.

[3] Plaintiff's sworn testimony and relevant parts of HR 102-1062 were evidenced in Appendix II before the U.S. Court Of Appeals For The Federal Circuit.

Contrary to the lower Court's claim, the letter was *not* sent to private parties, but to government officials in the belief they could assist in the plight of the mistreated veterans.[4]

Copies sent to Ambassador Bruce Laingen, Executive Director of a congressional commission and Paul W. Schafer, M.D., a DVA physician were deemed a "violation" of the Privacy Act, notwithstanding that congressional commissions are exempt from the Act,[5] and VA physicians routinely review patient records for the sole purpose of providing medical care without first obtaining consent.

The DVA claimed it fired Plaintiff because he violated the Privacy Act in this instance, although Plaintiff's release was inadvertent, caused no harm, subsequent consent was obtained, and two fact finding reviews found "no violation." [1, 6] The letter actually benefited some veterans, for others it was too late.

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[4] Recipients were (1) Plaintiff's Congressman (2) Office of The Special Counsel of U.S. Merit Systems Protection Board (3) Chief, DVA Medical Director (4) Paul W. Schafer, M.D., Director, National Association of VA Physicians (who was also a VA physician) and (5) Ambassador Bruce Laingen, Executive Director, National Commission on the Public Service. Chartered by Congress, this commission was also known as the Volcker Commission. (Paul Volcker, former Chairman Federal Reserve).

[5] The Privacy Act 5 U.S.C. § 552a.(b)(8) and (b)(9) permit disclosure:

> "(b)(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual:
>
> (b)(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee:"

[6] The Pennsylvania Unemployment Compensation Board of Review, January 10, 1992. Appendix-II: The U.S. Court of Appeals For The Federal Circuit.

Prior to firing Plaintiff, the DVA launched a campaign of harassment, hoping he would quit. He was subject to an OIG investigation of bogus "sexual misconduct" charges, wherein the official record was altered.[7] The tape tampering was confirmed by the FBI. He was reassigned duties routinely performed by registered nurses and prohibited from treating rheumatology patients. This resulted in neglect and mistreatment of arthritis patients with tragic results.[8] Subsequently, the DVA was compelled to hire an outside Rheumatologist at additional tax-payer expense. He was reassigned duty to rewrite renewals for expired prescriptions. He was suddenly given a "low-satisfactory" Proficiency Report (1988), despite

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[7] Plaintiff submitted multiple complaints with detailed documentation to the OIG, which never investigated. Subsequently, the OIG initiated an investigation of "rumors" of Plaintiff's sexual misconduct. This "investigation" altered sworn testimony (tapes, transcripts), subsequently confirmed by the FBI's tape analysis. Employees involved in this "investigation" were promoted!

[8] Arthritis patients were treated by non-rheumatologists resulting in misdiagnosis, malpractice and death. In the case of Robert Adams, when Plaintiff was prohibited from continuing his treatment, his rheumatoid arthritis was misdiagnosed as cancer. His death was attributed to the chemotherapy given for cancer he didn't have. His case was reviewed by University of Pennsylvania Faculty:

> "Dr. . . . of the University of Pennsylvania's medical school staff wrote in her review, "I believe there are multiple levels of negligence involved here. First, [the patient] should have been evaluated by a rheumatologist . . . to fully understand his [lymph-node condition]." Shaller however, was too busy updating expired prescriptions to be able to see any patients. Had his services been available, the veteran would have undoubtedly been properly disgnosed and thus spared severe pain and suffering." [From Veteran Magazine Vol. 12, No. 5/6. May/June 1992. Appendix II. U.S. Court of Appeals for the Federal Circuit].

The case was filed in U.S. District Court, Middle District of Pennsylvania; 3:91 cv 01553, *Adams et al v. U.S.A.* His widow received a substantial settlement.

sworn testimony from his supervisor of his "excellent" care, and after all prior years of "outstanding" evaluations. Subsequently, the DVA failed to issue yearly Proficiency Reports although they are required by its regulations. Requests for educational and annual leave were denied. The DVA falsified Plaintiff's W-2 statements. The IRS confirmed the erroneous W-2's and obtained Plaintiff's salary information from the VA's credit union where Plaintiff was paid by direct deposit. Plaintiff's mail was tampered with. The Postal Inspector: "This does reflect possible harassment on the part of the VA" and noted the futility of pursuing the matter; "Since my complaint is with a government agency, they (the United States Attorney) would be in a unique position of both prosecuting and defending the agency."

The DVA proposed to fire Plaintiff for the aforementioned letter. It convened a disciplinary board and held disciplinary hearings, contravening applicable regulations.[9] One veteran stated that his suffering caused "enough pain to take suicide" and provided compelling testimony supporting Plaintiff's actions. After that, no further testimony from identified veterans or surviving widows was permitted. Signed statements from the involved veterans or surviving widows were not allowed into evidence. The DVA stated that "due process did not apply", notwithstanding the applicable regulations that they do apply.[9]

The DVA did concede the letter caused no harm to veterans but claimed it caused "irreparable harm to the VA".

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[9] MP-1, Part I, Chapter 2, VA Investigation Policy; the Inspector General Act of 1978: Department of Medicine and Surgery's Administration Letter, IL 13-82-8, SUBJ: Administrative Investigations; MP-1, Part I, Chapter 15, Office of Inspector General Complaint Center; Department of Medicine and Surgery's Security guide for Conducting Administrative Investigations, dated August 20, 1988, Section 1.450-1.455 of Title 38, Code of Federal Regulations; and of the Department policies for Disciplinary Actions, Grievances and Hearings, MP-5, Part II.

The VA further determined that Plaintiff had to be fired because he was "*not rehabilitatible*"![10]

REASONS FOR GRANTING THE PETITION

(1) TO CORRECT A MANIFEST VIOLATION OF PUBLIC POLICY.

(2) JUSTICE REQUIRES ADJUDICATION BASED ON MERIT.

(3) TO PROVIDE SUPERVISORY AUTHORITY AND CORRECT THE MISCARRIAGE OF JUSTICE ENDURED BY PLAINTIFF.

Despite Congress' finding that Plaintiff was fired in retaliation for whistleblowing and current statutes explicitly providing judicial review,[11] the U.S. Court Of Federal Claims

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[10] Plaintiff is board certified in three specialties; Internal Medicine, Rheumatology, and Geriatric Medicine. He is an honors graduate; BS Chemistry, University of Maryland, and MD, University of Maryland School of Medicine. Postgraduate education; Cleveland Metro General Hospital-Case Western Reserve University, University of California, San Francisco-Fresno Medical Center, Scripps Clinic and Research Foundation (NIH Fellowship) and Stanford Medical School (Rheumatology).

[11] 38 U.S.C. § 7462 provides judicial review for "Major" adverse actions:

> "(f)(1) A section 7401 employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision."
>
> "(2)(A)(B)(C) In any case in which judicial review is sought under this sub-section, the court shall review the record and hold unlawful and set aside any agency action, finding, or conclusion, found to be—
>
> (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) Obtained without procedures required by law, rule or regulation having been followed; or
>
> (C) Unsupported by substantial evidence."

and the U.S. Court of Appeals For The Federal Circuit "failed" to find jurisdiction and dismissed Plaintiff's case.

Granting this writ will allow Plaintiff judicial review and relief of his wrongful firing. The Courts improperly excluded Plaintiff and failed to comply with Congress' intent.

(4) THIS MATTER AFFECTS HEALTH CARE AT VETERANS HOSPITALS NATIONWIDE where Plaintiff's case teaches a lesson.[12] The lesson learned is to remain indifferent to mismanagement, negligence and malpractice.[13] The concurrent rise in VA malpractice is a matter of record. While this matter binds only Plaintiff, the outcome has implications for current and prospective federal professionals who "do what's right" and then are fired.

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[12] Plaintiff's case received national media coverage including; syndicated columnist Jack Anderson (The Washington Post. May 14, 1990), newspaper editorials, magazines and television. Interest persists. [Appendix II. U.S. Court Of Appeals For The Federal Circuit]

[13] Plaintiff's case and Congress' findings have had a chilling effect on otherwise ethical physicians, who have been deterred from coming forward to challenge the DVA's practices. The public record from U.S. District Court serving the Wilkes-Barre VA Hospital, reveals millions of dollars in paid claims. The non-public paid "administrative" claims are similarly large.

Nationwide, VA malpractice and malpractice claims paid continues to increase:

> "From fiscal year 1990 to fiscal year 1994, malpractice claims against VAMC's have steadily increased from 678 to 978 with payments made to claimants totalling over $200 million dollars." (The U.S. General Accounting Office. December 21, 1995. GAO/HEHS-96-24)
>
> "The study shows that in 1997 there was a higher mortality rate among VA patients after a heart attack at 30 days, one year, two years, and three years. The same was true in 1998 and 1999 for the points for which there was follow-up data. . ." (U.S. Medicine. Vol. 39 No. 5. May, 2003.)

Congress lamented:[14]

> ". . . that, in light of the failure of the DVA quality assurance system to prevent and correct poor medical treatment, the Department's punishment of personnel who attempt to expose poor quality care closes out the last possible mechanism within the hospital system to address problems. Unless the DVA changes its policies and procedures, *the poor quality of care* provided to veterans will remain known only to those who provide it."

Congress' investigation produced incontrovertible evidence that the true operational policy of DVA is "to harass and/or fire whistleblowers".[15] Congress is *the* "appropriate authority" to judge this manifest violation of public policy. Clearly then, as a personnel matter, Plaintiff was "affected by an unjustified or unwarranted personnel action".

Plaintiff filed for judicial review and relief. U.S. District Court found joint subject matter jurisdiction with the U.S. Court of Federal Claims but lacked jurisdiction for Plaintiff's Tucker claims over $10,000.00.[16]

To avoid separate proceedings, the case was transferred "in its entirety".[17] Without a hearing or testimony, the US Court of Federal Claims dismissed in a 28 page Unpublished Decision finding "no subject matter jurisdiction".[18] It refused to transfer back to District Court for erroneous reasons.[19] The

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[14] *Id.* at 1. Emphasis added. p. 60a.

[15] *Id.* at 1.

[16] The District Court Decision. Appendix E, 49a-57a.

[17] The Stipulation To Transfer. Appendix D, 47a-48a.

[18] Claims Court Unpublished Decision Appendix C, 12a-46a.

[19] The Court recklessly misrepresented Plaintiff's prior litigation in District Court. Plaintiff was successful in several instances; obtaining a restraining order, request for documents, etc. The Court record speaks for itself. Defendant's motion for *res judicata* was denied, evidencing that Plaintiff's instant matter for judicial review is new.

U.S. Court of Appeals For The Federal Circuit affirmed.[20] Plaintiff's petitions for rehearing and rehearing en banc were denied.[21]

* * * *

The U.S. Court of Federal Claims was silent on Congress' finding that Plaintiff was fired in retaliation for whistle-blowing, which is a "prohibited personnel practice", and a manifest violation of public policy. Most disturbing, The U.S. Court of Appeals For the Federal Circuit spurned Congress' findings as mere "allegation".[22] Also, the Courts' refused to recognize The Pennsylvania Unemployment Compensation Board of Review as an "appropriate authority" in personnel disputes, having authority to order an employer (including the U.S. government) to pay benefits. Federal Courts accept their findings as dispositive.[23]

The Unemployment Board found: "Plaintiff [Claimant] did not intentionally violate regulations or any laws", thus successfully refuting the DVA's "reason" Plaintiff was fired.[24] Since Plaintiff was fired for something the Finders Of Fact determined he did not do, clearly his firing was "unjustified". Further, the DVA was ordered and paid Plaintiff's unemployment benefits. The Courts refused to recognize that the DVA's payment of unemployment benefits in these circumstances conclusively proves Plaintiff's firing was "unjustified".

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[20] Decision of Court of Appeals. Appendix B, 3a-11a.

[21] Petitions Denied. Appendix A, 1a-2a.

[22] *Id.* at 20. *See* p. 11a.

[23] "State and Federal Courts in Pennsylvania addressing this issue have held that the facts found during unemployment compensation proceedings may have a preclusive effect when: the issue before the Court is identical to the one raised in the subsequent litigation. . ." (Pennsylvania Employment Law Letter, April 1995).

[24] *Id.* at 6.

The Congress and The Pennsylvania Unemployment Board are both "appropriate authorities". Their Findings of Fact conclusively prove that Plaintiff was "affected by an unjustified or unwarranted personnel action". This is sufficient to trigger the Back Pay Act [25] and jurisdiction in the U.S. Court of Federal Claims under the Tucker Act,[26] for employees not excluded by *Fausto*.[27]

The U.S. Court of Federal Claims did find "Plaintiff Presents a Cognizable Back Pay Act Claim",[28] but "failed" to find jurisdiction. Plaintiff's ("money-mandating") pay statutes are under 38 U.S.C. § 7404; grades and pay scales and §§ 7431-33 and 7438; special pay authority.

The Courts' "failure" to find jurisdiction derives from its faulty analysis. As shown below, (1) it refused to apply the plain language of the relevant judicial review statute, instead, it "created" its' own *Simple Logical Extension*; (2) it failed to follow the correct legal standard and use "current law"; (3) it wrongly used *Fausto* to exclude Plaintiff because he is statutorily provided judicial review and is not under CSRA;

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[25] The Back Pay Act, 5 U.S.C. § 5596(b).

[26] The Tucker Act, 26 U.S.C. § 1491(a)(1).

[27] *United States v Fausto*, 484 US 439 (1988).

> "The CSRA established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act." 484 U.S. at 455."

Fausto controls only employees under CSRA. *Khan* held that VA physicians such as Plaintiff appointed under 38 U.S.C. § 4104(1) are not covered by CSRA. Also, Plaintiff has statutorily defined judicial review; 38 U.S.C. § 7462 (f)(1). Therefore, *Fausto* does not exclude Plaintiff from Claims Court jurisdiction.

[28] *Id.* at 18. *See* 38a.

and (4) it ignored *Worthington* [29] which held that the U.S. Court of Federal Claims has jurisdiction for claims not under CSRA, which otherwise fall within the jurisdictional grant of the Tucker Act. (5) Finally, it failed to respect Congress' findings, declaring them mere "allegation".

The analysis begins with the *Khan* precedent: [30, 31]

> "Dr. Khan was a VA physician, who like Dr. Shaller, was appointed under 38 U.S.C. § 4104(1) and who, like Dr. Shaller, filed a claim against the agency for back pay and reinstatement. *Khan* 201 F.3d at 1379. This Court held that the Civil Service Reform Act ("CSRA") does not apply to physicians appointed under section 4101(1). *Id.* at 1381-82. We further held that as such a physician, Dr. Khan had an exclusive grievance procedure under 38 U.S.C. § 7463."

Relying on *Fausto* and with § 7463 absent judicial review, The US Court of Appeals For The Federal Circuit held that Dr. Khan was precluded from The US Court Of Federal Claims.

Plaintiff [Dr. Shaller] is statutorily under § 7462 [32] *unlike* Dr. Khan. *Khan* holds that Plaintiff has an exclusive grievance procedure under 38 U.S.C. § 7462! The critical difference here is that § 7462 *Explicitly* provides judicial review. But, instead of properly following *Khan* by using

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[29] *Worthington v United States*, 168 F.3d 24 (Fed. Cir. 1999).

[30] *Id.* at 20. *See* 9a.

[31] *Khan v United States*, 201 F.3d 1375 (Fed. Cir. 2000).

[32] Grievance procedures are defined in 38 USC § 7461 and depend on the adverse action: "Major adverse actions" are under § 7462 and "Other adverse actions" under § 7463.

Section § 7461(2)(E) defines "Discharge" as a "Major adverse action"; therefore subject to the grievance procedures in § 7462. Section § 7462(f)(1) provides for judicial review.

Section § 7463 does not provide for judicial review.

the plain language of the relevant judicial review statute, The Court skillfully transformed it by "creative extension":[33]

> ". . . the Federal Circuit finally held that 38 U.S.C. § 7463 (the provision which applied to Dr. Khan) created an exclusive remedy for section 7401(1) personnel. Clearly, by the *Most Simple Logical Extension*, the same holds true for 38 U.S.C. § 7462, as well as its predecessor, 38. U.S.C. § 4110."

The Court's wizardry *Converted* Dr. Khan's remedy into Plaintiff's remedy, ignoring the fact that Plaintiff's remedy in § 7462 provides judicial review. The Court then *Applied* Dr. Khan's remedy in § 7463 to Plaintiff, and precluded The Court's jurisdiction.

Plaintiff was wrongly excluded from the U.S. Court of Claims by this judicial legerdemain. The relevant controlling legal authority that provides Plaintiff judicial review: 38 U.S.C. § 7462(f)(1) was ignored.

The U.S. Court of Federal Claims was wrong because: (1) The Court must use the plain language of the relevant judicial review statute. It cannot "create" its' own by *Logical Extension*. (2) *Fausto* does not preclude Plaintiff from Claims Court jurisdiction because he is not under CSRA and he is statutorily provided judicial review.

The US Court Of Appeals For The Federal Circuit defended the U.S. Court Of Federal Claims by revealing it was not really using the "current" statutory construction of § 7462(f)(1) but its predecessor, § 4110 because:[34]

> ". . . The events giving rise to plaintiff's claims occurred between March 1988 and January 1991, prior to Congress' amendment and recodification of 38 U.S.C.

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[33] *Emphasis added. Id.* at 18. *See* 43a..

[34] *Id.* at 20. *See* footnote #1, 9a and footnote #2, 10a.

> § 4110. To that end, the Court of Federal Claims applied the prior version of 38 USC § 4110."[35]

This is impermissible because it violates the correct legal standard to use "current law". This Supreme Court's precedent still reigns: [36]

> "The court held that an appellate court confronted with a change in the law "must apply the law in effect at the time it renders its decision," whether the change was constitutional, statutory, or judicial."

The U.S. Court of Appeals For The Federal Circuit's precedent:[37]

> "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice, or there is statutory direction or legislative history to the contrary."

In jurisdictional matters, as the case here, This Supreme Court held in Landgraf:[38]

> "We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed . . . Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case". . . *PRESENT LAW NORMALLY GOVERNS* in such situations because jurisdictional statutes "speak to the power of the Court rather than to the rights or obligations or the parties. . ."

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[35] The prior version of 38 U.S.C. § 4110 did not preclude jurisdiction in Claims Court. It was repealed and replaced with 38 U.S.C. § 7461 *et seq.*; "Disciplinary and Grievance Procedires." Public Law 102-40. Department of Veterans Affairs Health-Care Personnel Act of 1991 (May 7, 1991).

[36] *Thorpe v Durham Housing Authority*, 393 US 268 (1969).

[37] *Forshey v Principi*, 284 F.3d 1335 (Fed. Cir. 2002) (*en banc*).

[38] *Emphasis added. Landgraf v USI Film Prod.*, 511 US 244 (1994).

* * * *

Independent of the foregoing, Plaintiff has jurisdiction in the U.S. Court of Federal Claims. Recall, The Court found Plaintiff presented a Cognizable Back Pay Act Claim, and *Khan* held he is not under CSRA. In these circumstances, jurisdiction is controlled by *Worthington*:[39]

> "because his claim is not within the coverage of the CSRA and because it otherwise falls within the jurisdictional grant of the Tucker Act, The Court of Federal Claims has jurisdiction to adjudicate this dispute."

Here, The Court ignored its' own applicable precedent.

* * * *

CONCLUSION

I. SUMMARY OF THE KEY LEGAL POINTS DEMONSTRATING JURISDICTION IN THE U.S. COURT OF FEDERAL CLAIMS

1. The U.S. Congress and The Pennsylvania Unemployment Board are "appropriate authorities".

(a) Congress *found* Plaintiff was fired in retaliation for whistleblowing.

(b) The Pennsylvania Unemployment Board *found* "Claimant did not intentionally violate regulations or any laws." The DVA was *ordered* and *paid* unemployment benefits.

Therefore, Plaintiff's firing was "an unjustified personnel action" determined by "appropriate authorities".

2. The U.S. Court of Claims *found* Plaintiff presented a "Cognizable Back Pay Act Claim". The Back Pay Act is the substantive right required for jurisdiction in the U.S. Court of Federal Claims under the Tucker Act for employees not

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[39] *Id.* at 29.

excluded by *Fausto*. Plaintiff's ("money-mandating") pay statutes are under 38 U.S.C. § 7404; grades and pay scales and § 7431-33 and 7438; special pay authority.

3. Plaintiff is not excluded by *Fausto*. (controls only employees under CSRA).

(a) *Khan* held VA physicians such as Plaintiff are not under CSRA.

(b) Plaintiff is provided judicial review by statute: 38 U.S.C. 7462(f) (1).

4. The Court must use the plain language of the relevant statute, and cannot create its' own "*Logical Extension*", via judicial legerdemain.

5. The Courts must adhere to the correct legal standard and use "current law".

6. In matters of jurisdiction, as the case here, This Supreme Court's decision in Landgraf held "*PRESENT LAW NORMALLY GOVERNS*".

7. Independently, and consistent with the above, *Worthington* held The Court of Federal Claims has jurisdiction for claims not under CSRA but otherwise within the jurisdictional grant of the Tucker Act.

The analysis demonstrates that Plaintiff *HAS* jurisdiction in the U.S. Court of Federal Claims if the matter is accorded proper jurisprudence.

II. THE GOVERNMENT CODE OF ETHICS AND A MATTER OF PUBLIC POLICY

It is illegal under 5 U.S.C. 2302 to take a personnel action that violates any law implementing or directly concerning merit system principles. Two are relevant here (1) Lloyd-Lafollette Act, 5 USC § 7211, and (2) the Code of

Ethics for Government Service, 5 USC § 7301. The Lloyd-Lafollette Act provides:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a Committee or Member thereof, may not be interfered with or denied.

The Code of Ethics begins:

> Any person in government should: I. Put loyalty to the highest moral principles and to country above loyalty to persons, party or Government department.

Congressional testimony revealed: [40]

> "DVA whistleblowers consistently are condemned for demonstrating a greater loyalty to veterans than to the Department of Veterans Affairs."

Whistleblowing and whistleblower protection are significant public concerns, shown by the selection of TIME Magazine's "2002 Persons of the Year—The Whistleblowers",[41] and The Sarbanes-Oxley Act of 2002. Investigation of corporate scandals revealed that employees feared "career suicide" if they came forward.[42] The public concern is valid, because indifference to improper conduct contributed to huge financial losses and a new era of distrust.

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[40] Testimony of Thomas Devine, Esq. Legal Director, Government Accountability Project. Washington, DC. before the House Government Operations Subcommitee on Human Resources and Intergovernmental Relations. November 20, 1991.

[41] TIME Magazine. Special Double Issue. December 30, 2002/January 6, 2003.

[42] Business Week. December 16, 2002. pg. 107-110.

The government's public policy codifies reprisals against whistleblowers [43] as a "prohibited personnel practice" in the CSRA of 1978 and The Whistleblower Protection Act of 1989.

> "Peer review and reporting through the chain of command does not always work. In these cases public denunciation or whistle-blowing must still be part of the armament of professional ethics. The obligation to blow the whistle, when all else has failed, is grounded in two simple ideas:
>
> First, those who remain silent consent.
>
> Second, the inaction of good people is the main reason why bad people continue to harm others." [44]

III. IN THE INTEREST OF SUBSTANTIAL JUSTICE

Congress spoke on Plaintiff's case. It found as a factual matter that he was fired in retaliation for whistleblowing and the DVA's policy is "to harass and/or fire whistleblowers". This alone is sufficient evidence his firing was "unjustified" and represents a manifest violation of public policy.

Plaintiff's actions were medically necessary in view of the DVA's malpractice, and mandated by the ethical principles of the medical profession and the government's own code of ethics. *Plaintiff's medical judgment and the Facts provided in his sworn congressional testimony were never disputed.*

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[43] Whistleblowing is defined under 5 U.S.C. § 2302(b)(8) as

> "any disclosure of information by an employee which the employee reasonably believes evidences (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law, . . . (or for reasons of national security/foreign affairs)."

[44] Health Care Ethics Principles and Problems. Thomas M. Garrett, Harold W. Ballie, Rosellen M. Garrett. Prentice Hall. 1989.

Congress provided VA physicians with a judicial review statute; 38 U.S.C. § 7462(f)(1), because of the DVA's "deplorable" treatment of physicians who speak out. The Courts never "found" this judicial review statute applied to Plaintiff.

Indifference contributes to the DVA's increasing malpractice. Granting this writ should improve medical care at VA hospitals by demonstrating that physicians who "do what's right" and are fired, are permitted the statutorily provided judicial review in Claims Court for reinstatement and back pay.

Plaintiff was fired because he wrote a letter of complaint to the OIG. The identified veterans or surviving widows applauded his action, but the DVA was embarrassed and fired him.

The Court's "failure" to find jurisdiction stems from its flawed analysis. The correct analysis finds jurisdiction in Claims Court pursuant to the Tucker Act, Back Pay Act, and the appropriate judicial review statute, in view of Congress' determination that Plaintiff's firing was "unjustified."

Dismissing this case is contrary to the Supreme Court's precedent.[45]

> The court should not grant a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Plaintiff has established jurisdiction in District Court for injunctive and declaratory relief with monetary relief up to $10,000.00. Plaintiff *relied* on the District Court's finding of "joint subject matter jurisdiction" with the Court of Federal

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[45] *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Claims. Therefore, dismissal is unjust, and if there is truly no jurisdiction in the Court of Federal Claims, than *justice requires* transfer back to District Court to afford Plaintiff limited relief.

Dismissal nullifies Congress' intent and the law. The courts failed to follow proper jurisprudence. The courts failed to adjudicate on merit. To date, the courts have failed to serve the public interest.

The tax-payer (payer of the malpractice claims) and more importantly veterans (victims of malpractice) are best served when VA physicians properly practice medicine without retaliation. The DVA's mission is to serve America's veterans, not itself. This Supreme Court must exercise its supervisory power and grant this writ of certiorari because it is in the public interest with a special interest for veterans, and to correct the miscarriage of justice endured by Plaintiff, and because it is in the interest of substantial justice.

Respectfully submitted,

DAVID A. SHALLER, M.D.
Pro se
259 Church Street Apt. 32
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(570) 287-8524

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed Apr. 15, 2003]

02-5169

DAVID A. SHALLER, M.D.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 22, 2003.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY
Clerk

Dated: April 15, 2003

cc: David A. Shaller
Michael D. Austin

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

02-5169

DAVID A. SHALLER,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: February 5, 2003

Before NEWMAN, GAJARSA, and LINN, *Circuit Judges.*

PER CURIAM.

DECISION

David Shaller ("Dr. Shaller") appeals from the decision of the United States Court of Federal Claims, dismissing his complaint for lack of jurisdiction and failure to state a claim upon which relief can be granted. *Shaller v. United States*, No. 97-534C, (Fed. Cl. June 28, 2002). We *affirm.*

BACKGROUND

On December 7, 1983, the Veterans Administration Medical Center ("VAMC") appointed Dr. Shaller as Chief of the Rheumatology Section of the Veterans Administration Medical Center at Wilkes-Barre, Pennsylvania ("WBMC"). One year later, Dr. Shaller was appointed as Chief Physician of WBMC's Nursing Home Care Unit ("NHCU"). In March 1988, Dr. Shaller complained to the national office of the Veterans Administration ("VA") about the transfer of a

patient from the acute pulmonary care ward to the NHCU. A short time after Dr. Shaller's complaint, the patient's transfer was countermanded.

Dr. Shaller did not let the issue rest. In May 1988, Dr. Shaller filed a formal objection regarding the original transfer decision. A few months later, Dr. Shaller complained to the Regional Director of the VA. In July 1988, the Regional Director of the Office of Inspector General ("OIG") received an anonymous letter charging Dr. Shaller with sexual misconduct. A Board of Investigation determined that the charges against Dr. Shaller were unsubstantiated. Dr. Shaller claimed that his complaints about mismanagement and malpractice led to the baseless sexual misconduct charges. He also claimed that in the ensuing investigation, his due process rights were violated as well as various VA internal procedures and regulations. These allegations led to further inquiries.

After the OIG referred Dr. Shaller to the Office of Special Counsel of the Merit Systems Protection Board ("Board"), the Board investigated Dr. Shaller's complaint that the VA was retaliating against him because of his complaints of mismanagement and malpractice. In addition, the Haber Commission, a regional investigatory board, took up the issue of Dr. Shaller's original complaint about the March 1988 patient transfer incident. The Haber Commission issued a report finding no wrongdoing by the VAMC and no shortcomings in Dr. Shaller's professional competence and motivations regarding the incident, but recommended that he be transferred to another facility.

In November 1988, before the Haber Commission issued its finding, Dr. Shaller received a "low satisfactory" performance rating. In an apparent response his performance rating, Dr. Shaller wrote a letter of complaint about VAMC management officials to the OIG in which he forwarded copies to various government entities and private parties. In

an attachment to the letter, he included confidential patient information, such as names, social security numbers, diagnoses, and treatments. As a result of Dr. Shaller's release of confidential patient records, in August 1989, the VA recommended that Dr. Shaller be discharged.

In October 1990, the disciplinary board upheld the VA's recommendation to discharge Dr. Shaller. Subsequently, by letter dated November 7, 1990, the Chief Medical Director of the VA informed Dr. Shaller that his termination was to become effective as of November 13, 1990. After an unsuccessful appeal to the Secretary of the VA, Dr. Shaller's discharge became a final agency action on January 17, 1991.

Since his discharge, Dr. Shaller has filed eight different actions in district court. All of the actions are related to his removal, which he alleged was in retaliation for his whistleblowing activities. In the various district court actions, Dr. Shaller alleged a variety of Constitutional, statutory, and regulatory violations and sought $750,000 in damages. In the last action filed, the district court, after the United States filed a motion to dismiss for lack of jurisdiction, gave Dr. Shaller two options: 1) lower the requested damage amount to fall within limits set by the Little Tucker Act, 28 U.S.C. § 1346 (2000), or 2) consent to have his monetary claims transferred to the court of Federal Claims. On June 6, 1997, the parties in the district court proceeding agreed to the transfer of the entire case to the Court of Federal Claims.

The Court of Federal Claims properly dismissed Dr. Shaller's suit for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The Court of Federal Claims noted that the district court had jurisdiction pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et. seq.*; (2000), over Dr. Shaller's claims for declaratory and injunctive relief. Nevertheless, the Court of Federal Claims expressly declined to transfer

the case back to the district court. Dr. Shaller appeals the judgment of the Court of Federal Claims. We have jurisdiction to review this case under 28 U.S.C. § 1295(a)(3) (2000).

DISCUSSION

We review *de novo* whether the Court of Federal Claims correctly dismissed Dr. Shaller's claims for lack of subject matter jurisdiction and failure to state a claim for which relief may be granted. *Ledford v. United States*, 297 F.3d 1378, 1380 (Fed. Cir. 2002).

On appeal, Dr. Shaller asserts that the Court of Federal Claims has jurisdiction to hear his case under various provisions of (1) the APA, 5 U.S.C. § 701 *et. seq.*; (2) 38 U.S.C. § 7462 (2000); (3) the Tucker Act, 28 U.S.C. § 1491 (2000); and (4) the Little Tucker Act, 28 U.S.C. § 1346 (2000). He further submits that the Court of Federal Claims may hear his case as a matter of public policy.

First, Dr. Shaller contends that there is jurisdiction in the Court of Federal Claims for his claims under the Tucker Act. The Tucker Act, 28 U.S.C. § 1491, confers jurisdiction to the Court of Federal Claims to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." *Id.* at § 1491(a)(1). Therefore, the Tucker Act is only a jurisdictional statute; it does not, by itself, create a substantive right enforceable against the United States for money damages. *See United States v. Testan*, 424 U.S. 392, 398 (1976). In essence, in order to bring suit under the Tucker Act, the plaintiff must "assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States." *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998). A

money-mandating statute is one that can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Khan v. United States*, 201 F.3d 1375, 1378 (fed. Cir. 2000) (quoting *Testan*, 424 U.S. at 400).

Similarly, the Little Tucker Act confers jurisdiction to the district courts and the Court of Federal Claims over civil actions, not exceeding $10,000, founded upon the Constitution or an Act of Congress, a regulation, or a contract with the United States. 28 U.S.C. § 1346(a)(2). Like the Tucker Act, this statute is only jurisdictional and the party asserting such a claim must assert a separate money-mandating statute. *Litzenberger v. United States*, 89 F.3d 818, 820 (Fed. Cir. 1996). In this case, to the extent Dr. Shaller could plead a separate money-mandating statute on which to seek relief, he is precluded from relying on the Little Tucker Act as a jurisdictional basis because his monetary claim is for $750,000, and, thus, this statute does not apply.

Next, Dr. Shaller asserts that the Court of Federal Claims has jurisdiction to hear his suit under the APA, specifically 5 U.S.C. § 702. Section 702 provides, in relevant part, as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Id. (emphasis added).

This statute expressly precludes actions seeking monetary damages. In addition, § 702 is not a jurisdictional statute and, as such, does not confer jurisdiction on the Court of Federal Claims. *Crocker v. United States*, 37 Fed. C1.191, 197 (1997), *aff'd*, 125 F.3d 1475 (Fed. Cir. 1997) ("The Court of Federal Claims does not have general federal question jurisdiction, however, and it is well established that the APA is not an independent basis for this or any other court to exercise jurisdiction over claims for money."). Therefore, Dr. Shaller may not rely on the APA as a statute on which to base jurisdiction in the Court of Federal Claims.

Even though the Court of Federal Claims did not have jurisdiction to hear Dr. Shallers' claims, the court did acknowledge that there was jurisdiction, under the APA, in the district court. A decision by the Court of Federal Claims concerning whether to transfer a claim to another court pursuant to 28 U.S.C. § 1631 (2000) is discretionary and is reviewed on appeal for abuse of discretion. *See LeBlanc v. United States*, 50 F.3d 1025, 1031 (Fed. Cir. 1995). Here, the Court of Federal Claims declined to transfer the case back to the district court pursuant to 28 U.S.C. § 1631 because: (1) neither party requested such a transfer; (2) Dr. Shaller had already brought eight separate, unsuccessful suits before the district court on these issues; and (3) Dr. Shaller declined the option during the eighth lawsuit to keep the case in district court. Based on these factors, we do not find that the Court of Federal Claims abused its discretion when it declined to transfer the case back to the district court under 28 U.S.C. § 1631.

Next, even though "plaintiffs complaint appears to be convoluted, if not somewhat contradictory," the Court of Federal Claims, pursuant to the Federal Rules of Civil Procedure, liberally construed Dr. Shaller's complaint as

relying on 38 U.S.C. § 7462 [1] for his cause of action as well as the basis for jurisdiction. In any event, Dr. Shaller's reliance on 38 U.S.C. § 7462 fails. With respect to jurisdiction, 38 U.S.C. § 4110 is not a money-mandating statute because it does not, expressly or by implication, mention that a party is entitled to compensation for damages. *Testan*, 424 U.S. at 399-400. Thus, Dr. Shaller may not rely on 38 U.S.C. § 4110 as a money-mandating statute in order to bring a claim under the Tucker Act.

As for asserting a cause of action under 38 U.S.C. § 4110 (1991), the Court of Federal Claims did not err when it ruled that Dr. Shaller's back pay claim under 5 U.S.C. § 5596 (2000) was statutorily precluded from judicial review in that court by 38 U.S.C. § 4110. In support of this holding, the Court of Federal Claims relied upon *Khan*, that such a claim is statutorily precluded. Dr. Khan was a VA physician who, like Dr. Shaller, was appointed under 38 U.S.C. § 4104(1) and who, like Dr. Shaller, filed a claim against the agency for back pay and reinstatement. *Khan*, 201 F.3d at 1379. This Court held that the Civil Service Reform Act ("CSRA") does not apply to physicians appointed under section 4104(1). Id. at 1381-82. We further held that as such a physician, Dr. Khan had an exclusive grievance procedure under 38 U.S.C. § 7463. Id. at 1382. Moreover, under the mandate of *United States v. Fausto*, 484 U.S. 439 (1988), Dr. Khan could not bring his claims in the Court of Federal Claims. *Khan*, 201 F.3d at 1381-82. In *Fausto*, the Supreme Court held that the "deliberate exclusion of employees in respondent's service

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[1] On May 7, 1991, 38 U.S.C. §§ 4101-4618 were renumbered and recodified at 38 U.S.C. §§ 7401 et seq. Section 4110, in particular, relates to the disciplinary and grievance procedures of the VHA personnel. The events giving rise to plaintiffs claims occurred between March 1988 and January 1991, prior to Congress' amendment and recodification of 38 U.S.C. § 4110. To that end, the Court of Federal claims applied the prior version of 38 U.S.C. § 4110.

category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act." 484 U.S. at 455.

Here, Dr. Shaller, like Dr. Khan, was a VA medical doctor appointed under 38 U.S.C. § 4104(1). In determining that Dr. Shaller had a similar exclusive remedy, the Court of Federal Claims stated that "[a]lthough Dr. Shaller, unlike Dr. Khan, is covered under the earlier provisions, for purposes of the controlling legal issues involved in these two cases, the grievance procedures set forth in section 4110 [2] do not differ in any substantive manner from those set forth in sections 7462 and 7463. We agree that because the grievance procedures set forth in sections 7462 (covering major adverse actions involving questions of professional conduct or competence) and 7463 (covering other major adverse actions) are similar, the Court of Federal Claims did not err in extending Khan to claims under section 7462. To that end, Dr. Shaller is precluded from any appeal to the Court of Federal Claims under the Tucker Act or from the agency to the Board under the CSRA for that matter.

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[2] Section 4110 provides in relevant part:

(a) The Chief Medical Director, under regulations prescribed by the Administrator shall from time to time appoint boards to be known as disciplinary boards . . . to determine, upon notice and fair hearing, charges of inaptitude, inefficiency, or misconduct of any person employed in a position provided in paragraph (1) of section 4104 of this title. . . .

(d) A disciplinary board, when it its judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action . . . which shall include reprimand, suspension without pay, reduction in grade, and discharge. . . . The Administrator shall cause to be executed such action as the Administrator approves. The decision of the Administrator shall be final.

For the first time in his reply brief, Dr. Shaller asserts that 38 U.S.C. §§ 7431-33, 7438, are money-mandating statutes. These sections, however, relate to the payment of "special pay" to currently employed physicians and dentists in the VHA. *See* 38 U.S.C. §§ 7431-33, 7438. In any event, because Dr. Shaller did not raise these issues in the Court of Federal Claims, we need not address them.

Last, Dr. Shaller asserts that the Court of Federal Claims should hear his case as a matter of public policy. An allegation of violation of public policy is not enough to confer jurisdiction on the Court of Federal Claims. *Le Blanc*, 50 F.3d at 1029 n. 3 (Fed. Cir. 1995).

In conclusion, we affirm. the decision of the Court of Federal Claims dismissing Dr. Shaller's petition for lack of jurisdiction and failure to state a claim upon which relief may be granted.

APPENDIX C

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed June 28, 2002]

No. 97-534C

UNPUBLISHED

DAVID A. SHALLER, M.D.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

Motion to Dismiss—RCFC 12(b)(1) and 12(b)(6); COFC Jurisdiction Pursuant to 28 U.S.C. § 1343(a)(3), the Little Tucker Act, the APA, Veterans Affairs Regulations, 38 U.S.C. § 4110, and the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution; COFC Jurisdiction to Review the Remedies Set Forth in 38 U.S.C. § 4110.

Mitchell R. Leiderman, Media, Pennsylvania, for the plaintiff.

Thomas O. Coulter, Washington, D.C., with whom were *Jeanna E. Davidson*, Assistant Director, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, and *Frank W. Hunger*, Assistant Attorney General, for the defendant.

OPINION

BUSH, *Judge*

This case represents the ninth law suit initiated by plaintiff, Dr. David A. Shaller (Dr. Shaller or plaintiff), a former

employee of the Department of Veterans Affairs (VA) at the Veterans Administration Medical Center (VAMC), also referred to as the Wilkes-Barre Medical Center (WBMC), in Wilkes-Barre, Pennsylvania. Plaintiff filed the instant complaint after the United States District Court for the Middle District of Pennsylvania held that the United States Court of Federal Claims (COFC) has exclusive jurisdiction over plaintiff's monetary claims which exceeded $10,000, and transferred the matter to this court.

This case arises out of what Dr. Shaller alleges to have been a campaign of harassment and retaliation, culminating in his improper discharge from the VA. Specifically, plaintiff's complaint before this court alleges that defendant deprived plaintiff of his constitutional rights, in particular, his right to substantive and procedural due process, and violated the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, as well as 38 U.S.C. § 4110, and a number of VA regulations and internal procedures. Plaintiff seeks both monetary and non-monetary relief which this court will enumerate, *infra*.

This matter is currently before the court on defendant's Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6)[1] of the Rules of the Court of Federal Claims (RCFC) on the grounds that this court lacks jurisdiction to entertain plaintiff's claims and, alternatively, that plaintiff fails to state a claim upon which relief can be granted. For the reasons stated below, this court grants defendant's motion to dismiss.

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[1] The court notes that on May 1, 2002, this court's rules were revised. Therefore, although defendant actually relies upon the previous rules and cites Rule 12(b)(4) in support of its motion to dismiss, under the revised rules, the rule, while substantively the same as before, is currently Rule 12(b)(6). This opinion will refer to the new rules insofar as any differences do not impac this case. *See* RCFC 86.

BACKGROUND

I. Facts

On December 7, 1983, VAMC appointed Dr. Shaller as a staff physician, specifically as Chief of the Rheumatology Section at WBMC. The WBMC appointed Dr. Shaller as Chief Physician of its Nursing Home Care Unit (NHCU) on December 7, 1984.[2] In March 1988, after meeting with the refusal of his immediate supervisors to countermand the transfer of a patient from the acute pulmonary care ward to the NHCU, Dr. Shaller circumvented the authority of his immediate supervisors and complained about the transfer to the Office of the Medical Director in the Central office of the VA. After Dr. Shaller's complaint to the Central office, the patient's transfer was countermanded. In May 1988, Dr. Shaller filed a formal objection to management's refusal to rescind the original transfer decision. Shortly thereafter, a WBMC Board of Review convened to review Dr. Shaller's grievance and found that the WBMC had committed no wrongdoing. In July 1988, Dr. Shaller complained to the Regional Director of the VA and took particular issue with what he characterized as the board's "whitewashing" of the matter.

Also in July 1988, the Regional Director of the Office of Inspector General (OIG) received an anonymous letter charging Dr. Shaller with sexual misconduct. A Board of Investigation was convened to hear the charges and the board determined that the charges were unsubstantiated. Dr. Shaller

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[2] As a VAMC physician, Dr. Shaller was appointed to his position pursuant to 38 U.S.C. § 4104(1) (1991) which provides, in pertinent part:

> There shall be appointed by the Administrator additional personnel as the Administrator may find necessary for the medical care of veterans, as follows:
>
> (1) Physicians, dentists, podiatrists, registered nurses, physician assistants and expended - function dental auxiliaries;

claims that his whistleblowing activities prompted the baseless sexual misconduct charges. Dr. Shaller also alleges numerous violations of his due process rights and of the VA's internal procedures and regulations during the ensuing investigation.

After the OIG referred Dr. Shaller to the Office of Special Counsel of the Merit Systems Protection Board (MSPB), the MSPB opened a file regarding Dr. Shaller's complaint that the VA was retaliating against him because of his complaints of mismanagement and malpractice. Furthermore, due to Dr. Shaller's complaints to the Regional Director's Office, a regional investigatory board, the Haber Commission, convened to examine Dr. Shaller's grievances regarding the March 1988 patient transfer incident. On January 4, 1989, the Haber Board issued its report and found neither specific shortcomings with respect to Dr. Shaller's professional competence and motivations nor specific wrongdoing by the VAMC management. However, as a result of the investigation, the report issued by the Haber Board recommended Dr. Shaller's transfer to another facility.[3]

In November 1988, while the Haber Board investigation was still ongoing, Dr. Shaller received a "low satisfactory" performance rating for the personnel evaluation period which had just expired. On December 30, 1988, Dr. Shaller wrote a letter of complaint about VAMC management officials to the OIG, with copies forwarded to various government entities and private parties. In an attachment to the referenced letter, Dr. Shaller had included confidential patient information,

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[3] On February 13, 1989, Dr. Shaller was, in fact, reassigned to a position where he states that he was given menial tasks which grossly underutilized his experience and abilities. Prior to Dr. Shaller's February 13, 1989 reassignment, Dr. Shaller had been reassigned to Nurse Practitioner duties on September 21, 1988. Dr. Shaller also objected to that reassignment and accompanying responsibilities due to patient care and safety concerns.

such as names, social security numbers, diagnoses, and treatments. As a result of Dr. Shaller's release of patient records, which the VA viewed as a breach of confidentiality, in August 1989, the VA proposed that Dr. Shaller be discharged. Subsequently, the VA's Disciplinary Appeals Board conducted hearings to determine whether Dr. Shaller's employment with the VA should be terminated. In October 1990, the disciplinary board upheld the VA's recommendation that Dr. Shaller be discharged and by letter dated November 7, 1990, the Chief Medical Director of the VA informed Dr. Shaller that his termination was to become effective as of November 13, 1990. After an unsuccessful appeal to the Secretary of the VA, this discharge became a final agency action on January 17, 1991.

Plaintiff pursued further administrative claims procedures following his unsuccessful appeal to the Secretary of the VA. On January 13, 1993, Dr. Shaller filed an administrative tort claim. The agency denied the claim on July 30, 1993. On May 20, 1994, the agency also denied Dr. Shaller's claim for reconsideration.

II. Litigation History

Dr. Shaller filed his first eight lawsuits in the United States District Court for the Middle District of Pennsylvania. Dr. Shaller's first two suits were filed prior to his discharge hearing before the VA Disciplinary Appeals Board. In his first suit, Dr. Shaller obtained a temporary stay to secure legal representation in advance of his discharge hearing. In his second suit, Dr. Shaller succeeded in forcing the VA to disclose to him the names of those patients whose privacy he was alleged to have violated in order to better defend himself against the charges which had resulted in his dismissal from the VAMC.

Beginning with the third suit, Dr. Shaller challenged his dismissal and sought a temporary injunction against his

discharge. The district court denied Dr. Shaller's request because he had not exhausted his administrative remedies and because he had failed to satisfy the prerequisites required for an injunction. *See Shaller v. Derwinski*, No. 90 CV 1985 (M.D. Pa. Nov. 15, 1990). On November 30, 1990, Dr. Shaller filed a fourth suit against the VA challenging his "low-satisfactory" proficiency rating, and alleging that the low rating was in reprisal for his whistleblowing activities. The district court granted summary judgment for the government, specifically holding that there was no evidence of any retaliatory scheme against Dr. Shaller, and that Dr. Shaller had been unable to demonstrate that the report was unfair, i.e., that it had been issued as a retaliatory measure. *See Shaller v. VA*, No. 90 CV 2069 (M.D. Pa. May 29, 1992), *aff'd*, 993 F.2d 225 (3rd Cir. 1993) (Table).

Dr. Shaller's fifth suit challenging his discharge from the VAMC alleged the same set of facts as the previous suits, but sought tort damages as well as correction of his administrative record. However, his initial complaint was stricken by the district court pursuant to the Federal Rules of Civil Procedure (Fed. R. Civ. P.) 12(f) because it contained redundant and immaterial matters. *See Shaller v. VA*, No. 92 CV 1589 (M.D. Pa. Nov. 19, 1992). Dr. Shaller was given leave to, and did, file an amended complaint, which the district court dismissed because Dr. Shaller had improperly served the defendants. *See Shaller v. VA, No.* 92 CV 1589 (M.D. Pa. Aug. 2, 1993). Dr. Shaller's sixth lawsuit, directed against 27 individual defendants of the VA, was again based on the same core facts, but was dismissed yet again for failure to effect service. *See Shaller v. VA*, No. 93 CV 0108 (M.D. Pa. Aug. 19, 1993). In a seventh lawsuit, Dr. Shaller once more sued the United States, this time under the Federal Tort Claims Act (FTCA). Dr. Shaller's suit, filed November 15, 1994, again alleged the same core facts as his prior lawsuits, and set forth claims of wrongful discharge; infliction of emotional distress; tortious interference with a prospective

economic advantage; negligent violation of plaintiff's regulatory, statutory and constitutional rights; and invasion of privacy. The lawsuit was dismissed as being time-barred by the applicable statute of limitations. *See Shaller v. United States*, No. 94 CV 1861 (M.D. Pa. Sept. 15, 1994). The district court also dismissed plaintiff's claim for wrongful discharge on the additional ground that plaintiff was barred from bringing suit under the FTCA because of the existence of a separate comprehensive statutory scheme under which Dr. Shaller could have sought relief.

On January 16, 1996, Dr. Shaller brought an eighth lawsuit against the United States in district court pursuant to the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution (through 42 U.S.C. § 1985); the APA, 5 U.S.C. § 701 *et seq.*; the "Little Tucker Act," 28 U.S.C. § 1346(a)(2); 38 U.S.C. § 4110; other unspecified VA provisions in the United States Code; and various VA internal procedures and regulations. With regard to jurisdiction, plaintiff specifically cited 28 U.S.C. § 1343(a)(3); the Little Tucker Act; and the APA. This lawsuit set forth the same factual basis as the previous actions. The district court held that Dr. Shaller's constitutionally based claims, brought pursuant to 42 U.S.C. § 1985, were time-barred by the applicable statute of limitations and it dismissed those claims. The district court also held that while it had jurisdiction to hear Dr. Shaller's claims for declaratory and injunctive relief, the United States Court of Federal Claims had jurisdiction over Dr. Shaller's monetary claims in excess of $10,000 under the Tucker Act, 28 U.S.C. § 1491. Thus, the district court determined that the Court of Federal Claims had jurisdiction over plaintiff's claims for backpay, retroactive pay, reimbursement, and interest in excess of $10,000. The court afforded Dr. Shaller two choices: (1) lower his requested amount of damages and proceed in district court; or (2) agree to have the district court transfer plaintiffs monetary claims to the United States Court

of Federal Claims. On June 6, 1997, the parties stipulated that the district court could transfer the case to the Court of Federal Claims.

Plaintiff filed his complaint before this court on August 25, 1997. The complaint was identical to that filed in plaintiff's eighth lawsuit in district court except for the caption of the case. Again, plaintiff alleges that defendant deprived him of his constitutional rights, in particular, his right to substantive and procedural due process, and that defendant violated the APA, 5 U.S.C. § 701 *et. seq.*, as well as 38 U.S.C. § 4110 and other unspecified VA provisions in the United States Code, in addition to VA internal procedures and regulations. Plaintiff seeks, among other things, backpay, retroactive pay, reimbursement and interest in the amount of $750,000. Plaintiff states that his claims are based upon a series of events, including: (1) charges of insufficient response by the VA to plaintiff's allegations of malpractice and mismanagement at the VAMC; (2) an unfair and inaccurate proficiency report, rating plaintiff's performance as "low satisfactory"; (3) malicious mishandling of anonymous charges of sexual misconduct brought against plaintiff in reprisal for his "whistleblowing"; (4) wrongful discharge; and (5) subsequent loss of reputation. Plaintiff specifically points to 28 U.S.C. § 1346(a)(2), 28 U.S.C. § 1343(a)(3) and 5 U.S.C. § 701 *et. seq.* as the bases for jurisdiction.

On January 8, 1998, defendant moved to dismiss plaintiff's claims. Plaintiff submitted an opposition thereto on February 5, 1998. On February 18, 1998, defendant filed a reply to plaintiff's opposition. Subsequently, by leave of court, plaintiff filed a sur-reply to defendant's reply to plaintiff's opposition and defendant filed a sur-reply thereto. No oral argument was held in this matter.

DISCUSSION

I. Contentions of the Parties

Defendant argues that this court must dismiss plaintiff's claims because they fail to invoke this court's subject matter jurisdiction. Alternatively, the government contends that plaintiff has failed to state a claim upon which relief can be granted because: (1) plaintiff's claims are precluded by the doctrines of *res judicata* and collateral estoppel; and (2) plaintiff is limited by the remedies the VA provides and has failed to request the relief provided by the VA. Plaintiff opposes defendant's argument, expostulating that: (1) the government improperly filed a motion to dismiss in this court after the district court had ruled on a motion to dismiss in the previous lawsuit with an identical complaint; (2) defendant is estopped from asserting that this court lacks jurisdiction due to the district court's prior rulings in this matter and because defendant conceded that this court has jurisdiction when it stipulated that the district court suit be transferred to this court; (3) this court has jurisdiction over plaintiffs claim pursuant to the APA; (4) the doctrine of *res judicata does* not apply because none of the prior suits in district court were adjudicated on the merits; (5) plaintiff's monetary claims are not limited by the VA remedies: (6) plaintiff's complaint does not fail to state a claim for which relief may be granted since the claims are stated with sufficient specificity in accordance with the Federal Rules of Civil Procedure; and (7) defendant's motion to dismiss should be interpreted as a motion for a more definite statement, allowing plaintiff to correct any deficiencies present in his complaint.

II. Plaintiff has Failed to Demonstrate that Defendant's Motion to Dismiss is Improper.

As previously stated, plaintiff contends that defendant has improperly filed a motion to dismiss in this court. Plaintiff

argues that pursuant to RCFC 12,[4] defendant may file only one all inclusive motion in response to the initial complaint. In support of his argument, plaintiff relies upon RCFC 12(b) (explaining how defenses and objections should be presented to the court) and RCFC 12(g) (Consolidation of Defenses in Motion). Plaintiff also asserts that the district court has already ruled on the matters of whether this court has jurisdiction and whether plaintiff has failed to state a claim upon which relief can be granted. Defendant counters, submitting that RCFC 12(h)(2) entitles a party to assert the defense of failure to state a claim upon which relief can be granted in "any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." RCFC 12(h)(2).

RCFC 12(b), in pertinent part, states:

> Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings
>
> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) [not used]; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be granted; (7) failure to join a party under RCFC 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . . .

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[4] Plaintiff actually relies upon Rule 12 of the Federal Rules of Civil Procedure. RCFC 12 is the analog to the federal rule and therefore, this court will apply and refer its own rules as controlling in this matter.

RCFC 12(g) articulates, in relevant part:

> (g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) of this rule on any of the grounds there stated.

Neither RCFC 12(b) nor RCFC 12(g) prohibits defendant from bringing its motion to dismiss before this court. Furthermore, neither rule speaks to whether or not a defendant may bring a motion to dismiss in a transferee court.

Even if defendant had to consolidate all of its challenges into one motion, RCFC 12(g) would permit defendant to bring a motion to dismiss for failure to state a claim. As stated above, RCFC 12(g) prohibits a party from raising defenses or objections previously omitted in an earlier motion presenting defenses or objections with an exception for motions provided for in RCFC 12(h)(2). RCFC 12(h)(2) reads as follows:

> (h) Waiver of Preservation of Certain Defenses.
>
> (2) A defense of failure to state a claim upon which relief can be granted, . . . and an objection of failure to state a legal defense to a claim, may be made in any pleading permitted or ordered under RCFC 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

Defendant's motion is a motion for judgment on the pleadings and asserts the defense of failure to state a claim upon which relief can be granted. As RCFC 12(h)(2) provides

that a motion to dismiss for failure to state a claim may be brought at any time, defendant's motion satisfies the exception presented in Rule 12(g) and set forth in Rule 12(h)(2). *See George W. Kane, Inc. v. United States*, 26 Cl. Ct. 655, 658 (1992) (ruling that defendant's motion to dismiss for failure to state a claim was timely since RCFC 12(h)(2) allows such a motion to "be raised at any juncture in the proceedings, up to and including trial").

Finally, RCFC 12(h)(3) allows the court to review subject matter jurisdiction at any time if it appears "by suggestion of the parties or otherwise" that this court lacks jurisdiction over the parties' dispute. *See* RCFC 12(h)(3). The fact that this case has been transferred from district court is wholly irrelevant to this court's ability to determine whether it possesses subject matter jurisdiction in the first instance, as discussed more fully below. Accordingly, this court finds defendant's current motion to dismiss to be properly before this court.

III. Defendant is not Estopped from Challenging this Court's Subject Matter Jurisdiction Despite the District Court's Determination of COFC Jurisdiction and the Parties' Stipulation to Transfer the Matter.

As mentioned, plaintiff contends that the government is estopped from asserting that this court lacks subject matter jurisdiction because the district court ruled that this court has jurisdiction and the government conceded as much when it stipulated to the transfer of the case to this court. Plaintiff's argument is untenable.

Generally, pursuant to the "law-of-the-case doctrine," courts will not reopen issues that have been decided. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S. Ct. 2166, 2178, 100 L.Ed.2d 811 (1988) (citing *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L.Ed. 1152 (1912) (Holmes, J.)). However, this is

simply a practice and not a limit to a court's power. *Id.* With regard to this doctrine, the Supreme Court stated in *Christianson v. Colt Industries Operating Corp.* that:

> A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'

Id. (citing *Arizona v. California*, 460 U.S. 605, 618, n.8, 103 S. Ct. 1382, 1391, n.8, 75 L.Ed.2d 318 (1983)).

This court has revisited a district court's prior determination of the Court of Federal Claims' jurisdiction on more than one occasion. The court has revisited the matter of jurisdiction because this court possesses only the jurisdiction conferred upon it by Congress. *Lee v. United States*, 33 Fed. Cl. 374, 380 (1995) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, ___, 114 S. Ct. 1673, 1675, 128 L.Ed.2d 391 *(1994); Christianson*, 486 U.S. at 818, 108 S. Ct. at 2178). In keeping with the fact that only Congress may grant this court with jurisdiction, as well as the principle that "[a]nother court's jurisdictional determination cannot confer jurisdiction on this court or any other court," it has been repeatedly found that a district court may not confer jurisdiction on this *court. Lee, 33* Fed. Cl. at 380 (citing *Christianson*, 486 U.S. at816-18, 108 S. Ct. at 2177-78; *Clark v. United States*, 229 Ct. Cl. 570, 576-77 (1981)). *See also Eubanks v. United States*, 25 Cl. Ct. 131, 137 (1992) (citing *Berdick v. United States*, 222 Ct. Cl. 94, 99, 612 F.2d 533, 536 (1979)); *Son Broad., Inc. v. United States*, 42 Fed. Cl. 532, 536 (1998) (citing *A-B Cattle Co. v. United States*, 223 Ct. Cl. 514, 621 F.2d 1099, 1103 (1980)). Furthermore, because Congress alone may vest this court with jurisdiction, it is well-established that the court may evaluate its jurisdiction at any time, *Berdick v. United States*, 222 Ct. Cl.

94, 99, 612 F.2d 533, 536 (1979) (citations omitted), and that estoppel principles do not apply to jurisdiction, *Son Broad.*, *42* Fed. Cl, at 536 (citing *Dunklebarger v. Merit Sys. Prot. Bd.*, 130 F.3d 1476, 1480 (Fed. Cir. 1997); *Wood-Ivey Sys. Corp. v. United States*, 4 F.3d 961, 967 (Fed. Cir. 1993)); *Lee*, 33 Fed. Cl. at 380 (citing *Clark*, 229 Ct. Cl. at 576-77).

It is of little moment that, here, the district court determined that the Court of Federal Claims has jurisdiction and transferred the case to this court or that the parties stipulated that the matter be transferred to this court, because neither the district court nor the parties may confer jurisdiction upon this court. *See Son Broad.*, 42 Fed. Cl. at 536 (citing *Dunklebarger*, 130 F.3d at 1480; *A-B Cattle*, 223 Ct. Cl. 514, 621 F.2d at 1103; *Synernet Corp. v. United States,* 41 Fed. Cl. 375, 383 (1998), *aff'd*, 215 F.3d 1348 (Fed. Cir. 1999)). Rather, it is necessary for this court to evaluate whether it has jurisdiction and determine whether the district court's transfer decision was well-founded. If so, this court's jurisdictional inquiry will end. In light of the above, plaintiff's argument fails and this court will address, in the subsequent discussion, whether it has jurisdiction to entertain plaintiff's claims.

IV. Motion to Dismiss Pursuant to 12(b)(1)

a. Standard of Review for a Motion to Dismiss for Lack of Subject Matter Jurisdiction

Jurisdiction may be challenged by the parties or by the court on its own motion at any time, and if jurisdiction is found lacking, this court must dismiss the action. RCFC 12(h)(3). In rendering a decision on a motion to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), this court must presume all undisputed factual allegations to be true and construe all reasonable inferences in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236-37, 94 S. Ct. 1683, 40 L.Ed.2d 90 (1974); *Reynolds v. Army & Air Force*

Exch. Serv., 846 F.2d 746, 747 (Fed., Cir. 1988). The court should not grant a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957) (footnote omitted). Nonetheless, the non-movant bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Cubic Def. Sys., Inc. v. United States*, 45 Fed. Cl. 239, 245 (1999) (citing *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993); *Reynolds*, 846 F.2d *at 748; Maniere v. United States*, 31 Fed. Cl. 410, 413 (1994)). The court may make any factual findings necessary to adjudicate this motion, including findings on matters not raised in the pleadings. *Indium Corp. of Am., Inc. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 820, 107 S. Ct. 84, 93 L.Ed.2d 37 (1986).

b. COFC Jurisdiction

The Tucker Act delineates this court's jurisdiction. 28 U.S.C. § 1491 (1994). The Tucker Act does not create a substantive right to recover money damages in this court; rather, it allows recovery for claims founded on the Constitution, an act of Congress, regulation promulgated by the executive department, or any express or implied contract with the United States. 28 U.S.C. § 1491(a)(1); *Ky. Bridge & Dam, Inc. v. United States*, 42 Fed. Cl. 501, 516 (1998) (citing *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 63 L.Ed.2d 607, *reh'g denied*, 446 U.S. 992, 100 S. Ct. 2979, 64 L.Ed.2d849 (1980); *United States v. Testan*, 424 U.S. 392, 398-99, 96 S. Ct. 948, 47 L.Ed.2d 114 (1976); *United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983) (*en banc*), *cert. denied*, 465 U.S. 1065, 104 S. Ct. 1414, 79 L.Ed.2d 740 (1984)). A statute, regulation, or constitutional provision provides a substantive right only if it "can fairly be interpreted as mandating compensation by the Federal

Government for the damage sustained." *Testan*, 424 U.S. at 400, 96 S. Ct. at 955 (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009, 178 Ct. Cl. 599 (1967); citing *Mosca v. United States*, 417 F.2d 1382, 1386, 189 Ct. Cl. 283, 290 (1969), *cert. denied*, 399 U.S. 911, 90 S. Ct. 2197, 26 L.Ed.2d 565 (1970)). If the provision is found to be "money-mandating," the party need not rely upon a waiver of sovereign immunity beyond the Tucker Act. *See Huston v. United States*, 956 F.2d 259, 261 (Fed. Cir. 1992) (citing *United States v. Mitchell*, 463 U.S. 206, 218, 103 S. Ct. 2961, 2968, 77 L.Ed2d 580 (1983)).

The outlined jurisdictional basis for bringing a claim properly before this court holds true for civilian pay cases. However, a federal employee's terms and conditions of employment are normally governed by statutes, regulations, and Executive Orders since the federal employment relationship is generally created through the appointment process rather than through contract. *See Bigler v. United States*, 230 Ct. Cl. 985, 986 (1982) (stating that "public employment is presumptively not by contract; it is instead accomplished by appointment and controlled by statute, regulation, and Executive Order") (citing *Brown v. United States*, 226 Ct. Cl. 669, 670-71 (1981); *Urbina v. United States*, 192 Ct. Cl. 875, 881, 428 F.2d 1280, 1284 (1970)). As such, an employee is only entitled to the pay of the position to which the employee has been appointed. *See Testan*, 424 U.S. 402, 96 S. Ct. 955 (citing *United States v. Wickersham*, 201 U.S. 390, 26 S. Ct. 469, 50 L.Ed. 798 (1906)). Moreover, a federal employee may be precluded from bringing a claim in this court for an alleged wrong due to the enactment of the Civil Service Reform Act of 1978 (CSRA). If the CSRA's comprehensive remedial scheme provides a remedy for an employee, the employee is precluded from pursuing a remedy under the Tucker Act. *See McClary v. United States*, 775 F.2d 280, 282 (Fed. Cir. 1985). *Cf. United States v. Fausto*, 484 U.S. 439,

453, 108 S. Ct. 668, 676 (1988), 98 L.Ed.2d 830, *reh'g denied*, 485 U.S. 972, 108 S. Ct. 1250, 99 L.Ed.2d 448 (1988) (finding that the CSRA specifically excluded non-preference eligibles in excepted service from judicial right to review, thus, these individuals were precluded from seeking judicial review under Tucker Act based on Back Pay Act).

c. This Court Does Not Have Jurisdiction Over Plaintiff's Claims Pursuant to 28 U.S.C. § 1343(a)(3).

In his complaint, plaintiff has alleged that jurisdiction in this court exists under 28 U.S.C. § 1343(a)(3), among other statutory provisions. Defendant argues that not only is 28 U.S.C. § 1343(a)(3) not money-mandating, but that the statute only applies to actions taken "under the color of any *State* law," thus, plaintiff cannot rely upon that statute to assert jurisdiction in this court. Def. Mot. at 19 (emphasis in original). Plaintiff did not set forth any explanation for his reliance upon this statutory provision for jurisdiction in this court in either his complaint or his papers in opposition to defendant's motion to dismiss.

In order to discern whether 28 U.S.C. § 1343(a)(3) confers jurisdiction on this court over plaintiff's claims, this court will review the statute and its construction. Title 28 U.S.C. § 1343 states, in pertinent part:

> § 1343. Civil rights and elective franchise
>
> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of

> Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

A recognized rule of statutory construction is that "[t]he starting point in every case involving construction of a statute is the language itself." *Watt v. Alaska*, 451 U.S. 259, 265 101 S. Ct. 1673, 1677, 68 L.Ed.2d 80 (1981) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S. Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (POWELL, J., concurring); citing *Rubin v. United States*, 449 U.S. 424, 101 S. Ct. 698, 66 L.Ed.2d 633 (1981)). After the court looks at the plain meaning of the statute, it then turns to "extrinsic aids, such as legislative history, rules of statutory construction, and the construction placed on the statute by the agency which administers it, the ultimate objective being to discern, if possible, the intent of Congress." *J.M. Huber Corp. v. United States*, 27 Fed. Cl. 659, 663 (1993) (citing *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988)).

Section 1343(a)(3) states plainly that it confers district courts with original jurisdiction to "redress the deprivation, under color of any State law . . ." By this language alone, the court discerns that plaintiff cannot rely upon this statutory provision for jurisdiction since the statute clearly requires state action and vests jurisdiction over such cases specifically with district courts. This court and its predecessor have previously found, in reviewing section 1343(a)(4), that section 1343 grants original jurisdiction to the district courts over civil actions brought under that statutory provision and thus, such an action could not be sustained in this court as "this court has not been given an equivalent jurisdiction." *Blassingame v. United States*, 33 Fed. Cl. 504, 505 (1995), *aff'd*, 73 F.3d 379 (Fed. Cir. 1995) (Table) (citing *Sanders v. United States*, 32 Fed. Cl. 573, 576 (1995); *Anderson v. United States*, 22 Cl. Ct. 178, 179 n. 2 (1990), *aff'd*, 937 F.2d 623 (Fed. Cir. 1991)). *See also Bunch v. United States*, 33

Fed. Cl. 337, 341 (1995), *aff'd*, 78 F.3d 605 (Fed. Cir. 1996) (finding that section 1343 grants original jurisdiction to the district courts for civil actions brought under section 1343(a)(4) and concluding that "a claim premised on a violation of Title VII must be brought in district court, not in the Court of Federal Claims." (citation omitted)); *Rogers v. United States*, 14 Cl. Ct. 39, 50 (1987), *aff'd*, 861 F.2d 729 (Fed. Cir. 1988) (holding that because section 1343(a)(4) gives the district courts original jurisdiction, the district courts "have exclusive jurisdiction for claims based on 42 U.S.C. §§ 2000d to 2000d-4 . . . ."). This court finds the same conclusion is warranted in a review of section 1343(a)(3). The wording of section 1343(a)(3) does not permit any other meaning than that the district court has exclusive jurisdiction over claims brought under this statutory provision.

d. This Court Does Not Have Jurisdiction Pursuant to 28 U.S.C. § 1346(a)(2).

Plaintiff also asserts that this court possesses jurisdiction pursuant to 28 U.S.C. § 1346(a)(2), also known as "the Little Tucker Act." Defendant contends that section 1346(a)(2) is not money-mandating such that it would vest jurisdiction in this court and since section 1346(a)(2) applies only to claims of less than $10,000 (plaintiff claims damages in the amount of $750,000), section 1346(a)(2) is inapplicable to this action on that basis as well. Defendant is correct in its assertion.

The Little Tucker Act gives the district courts and this court concurrent jurisdiction over civil actions founded upon the Constitution or an Act of Congress, a regulation, or a contract with the United States, not exceeding $10,000. 28 U.S.C. § 1346(a)(2). This statute, like the Tucker Act, is jurisdictional in nature, i.e., it "does not create any substantive right enforceable against the United States for money damages." *Litzenberger v. United States*, 89 F.3d 818, 820 (Fed. Cir. 1996). *See also Richards v. United States*, 20 Cl. Ct. 753, 756 (1990) (stating that the Little Tucker Act is a

jurisdictional statute and a party cannot rely upon it to meet the substantive requirements of the Tucker Act). Instead, in order for a claim based upon the Little Tucker Act to be successful, the claim must also be founded upon a money-mandating provision of law. *Litzenberger*, 89 F.3d at 820; *Bobula v. United States Dept. of Justice*, 970 F.2d 854, 858 (Fed. Cir. 1992).

In this instance, plaintiff has failed to note any money-mandating provision upon which he relies as support for his Little Tucker Act claim. Just as pertinent to the issue of whether plaintiff may base his assertion of jurisdiction on the Little Tucker Act is the fact that plaintiff's complaint alleges damages in an amount in excess of $750,000. As stated, the Little Tucker Act only applies to claims that do not exceed $10,000. 28 U.S.C. § 1346(a)(2). Thus, irrespective of whether or not plaintiff's complaint contains a money-mandating provision upon which he bases his Little Tucker Act claim, plaintiff cannot rely upon the Little Tucker Act as a jurisdictional basis because his claims exceed the jurisdictional amount prescribed in the statute. In light of the foregoing, this court finds that it does not have jurisdiction over plaintiff's claims under 28 U.S.C. § 1346(a)(2).

e. This Court Does Not Have Jurisdiction Over Plaintiff's Claim Pursuant to the APA.

Defendant argues that plaintiff cannot rely on the APA as a predicate for jurisdiction because the APA, 5 U.S.C. § 701 *et seq.*, does not provide independent jurisdiction in this court and is not a money-mandating statute. Plaintiff counters, suggesting that this court has jurisdiction to review his discharge pursuant to the APA, in particular, section 702.

Section 702 of the APA states, in pertinent part, as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is

> entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

The language in section 702 does not indicate that Congress intended for the provision to provide for independent jurisdiction in this court. In fact, the APA "does not establish jurisdiction in this court over claims for money." *Synernet Corp. v. United States*, 41 Fed. Cl. 375, 382 (1998), *aff'd*, 215 F.3d 1348 (Fed. Cir. 1999) (Table) (citation omitted). *See also Mobin v. United States*, 22 Cl. Ct. 331, 334 (1991) (citation omitted). As recited, in order for this court to have jurisdiction over a claim, the party must base its claim upon a statute, regulation, constitutional provision, or contract that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 400, 96 S. Ct. at 955 (quoting *Eastport*, 372 F.2d at 1009; additional citations omitted). This court has repeatedly determined that the APA is not a money-mandating statute and thus, "the APA is not an independent basis for this or any other court to exercise jurisdiction over claims of money." *Crocker v. United States*, 37 Fed. Cl. 191, 197 (1997), *aff'd*, 125 F.3d 1475 (Fed. Cir. 1997) (citing *Union Bank & Trust Co. v. United States*, 27 Fed. Cl. 403, 404 (1992) (citing *Berry v. United States*, 27 Fed. Cl. 96, 102-03, *aff'd*, 6 F.3d 788 (Fed. Cir. 1993); *Allred v. United States*, 33 Fed. Cl. 349, 350-51 (1995))); *Faulkner v. United States*, 43 Fed. Cl. 54, 55 (1999) (citing *James v. Caldera*, 159 F.3d 573, 578 (Fed. Cir. 1998); *Brazos Elec. Power Coop., Inc. v. United States*, 144 F.3d 784, 786 (Fed. Cir. 1998); *Hernandez v. United States*, 38 Fed. Cl. 532, 537 (1997)); *Synernet Corp.*, 41 Fed. Cl. at 382 (citing *Crocker*, 37 Fed. Cl. at 197, *Allred*, 33 Fed. Cl. at

350-51; *Heagy v. United States*, 12 Cl. Ct. 694, 697-98 (1987), *aff'd*, 848 F.2d 1244 (Fed. Cir. 1988)); *Siegal v. United States*, 38 Fed. Cl. 386, 389 (1997) (citing *Ashgar v. United States*, 23 Cl. Ct. 226, 230 (1991); additional citations omitted)). Rather, the APA "provides the framework for determining when and how this court may review agency action." *Pender Peanut Corp. v. United States*, 20 Cl. Ct. 447, 451 (1990) (citing 5 U.S.C. § 551 *et seq.* (1988)); *Marathon Oil Co. v. United States*, 17 Cl. Ct. 116, 120 (1989) (citing *Foote Mineral Co. v. United States*, 228 Ct. Cl. 230, 233-34, 654 F.2d 81, 85 (1981)); *Mobin*, 22 Cl. Ct. at 334-35. Thus, it is firmly established that "the Claims Court only may follow the APA judicial review framework where plaintiffs have a money damages claim stemming from agency action and cognizable under the Tucker Act." *Pender Peanut*, 20 Cl. Ct. at 451-52, n. 3. Given the above legal precedent, this court is unable to entertain plaintiff's claim to the extent that it rests solely upon the APA.

Plaintiff attempts to circumvent the long-standing legal conclusion that the APA does not provide a party with jurisdiction in this court by pointing out that the Court of Federal Claims may hear the back pay claims of a federal employee, and that this court may hear a claim for money damages coupled with nonmonetary forms of relief. Plaintiff argues that since he has claimed damages which exceed $10,000 and has asserted violations of the APA which allegedly caused those damages, this court has jurisdiction under the Tucker Act. In asserting the applicability of the APA in this manner, plaintiff has merged several legal concepts. However, the resultant aggregation of theories does not lend support to his argument.

Dr. Shaller is correct in stating that this court has heard a federal employee's claim for back pay pursuant to the Back Pay Act (BPA), 5 U.S.C. § 5596. *See Worthington v. United States*, 168 F.3d 24, 26 (Fed. cir. 1999) (finding that the BPA

is money-mandating when it is "based on violations of statutes or regulations covered by the Tucker Act," thus falling within the Tucker Act's jurisdictional provision where no Civil Service Reform Act coverage existed); *Finkelstein v. United States*, 29 Fed. Cl. 611, 615 (1993) (noting that the plaintiff's claim for back pay was based upon a money-mandating statute, hence, this court had jurisdiction). Nevertheless, the BPA alone is not enough to invoke jurisdiction in this court. The act is derivative in nature since it does not, in and of itself, establish entitlement to back pay, but instead is dependant upon the government having violated some other statute or regulation which satisfies the requirement of the Tucker Act, such as the pay statutes. *Carpenter v. United States*, 28 Fed. Cl. 195, 198 (1993). *See also Worthington*, 168 F.3d at 26 (citing *Connolly*, 716 F.2d at 887); *Walker v. United States*, 11 Cl. Ct. 77, 80 (1986) (citing *Spagnola v. Stockman*, 732 F.2d 908, 912 (Fed. Cir. 1984); *Connolly*, 716 F.2d at 887; *Montalvo v. United States*, 231 Ct. Cl. 980, 982 (1982)); *Rehling v. United States*, 11 Cl. Ct. 334, 337 (1986), *aff'd*, 831 F.2d 305 (Fed. Cir. 1987) (citation omitted). Such entitlement is not, however, fixed by merely asserting an APA violation.

Given the above analysis, this court concludes that if plaintiff wishes to rely upon the APA, it may not do so for jurisdictional purposes, but only as a framework for the review of agency action in certain circumstances. Also, to the extent that plaintiff seeks to rely upon the BPA, the court will address this matter separately inasmuch as plaintiff's allegations of APA violations do not provide plaintiff with jurisdiction under the BPA.

f. Plaintiff May Not Rely Upon 38 U.S.C. § 4110 and Other VA Regulations and Internal Policies for Jurisdiction.

The court interprets Dr. Shaller's complaint not as asserting jurisdiction based on 38 U.S.C. § 4110, but rather, as

claiming that defendant violated his constitutional rights to substantive and procedural due process, equal protection, and free speech, under the APA, 38 U.S.C. § 4110 and various VA regulations and internal policies. Thus, plaintiff seeks both monetary and non-monetary relief based on these violations. The court views plaintiff's complaint in this manner because plaintiff asserts jurisdiction in paragraph 2 of his complaint, under 28 U.S.C. § 1346(a)(2), 28 U.S.C. § 1343(a)(3), and 5 T.S.C. § 701 *et seq.*, while in his opening paragraph, plaintiff states that he is bringing his action pursuant to specific constitutional amendments, the APA, the Little Tucker Act, 38 U.S.C. § 4110 and other VA internal regulations and unspecified VA provisions in the United States Code. Also, in paragraph 50 of plaintiff's complaint, plaintiff states that defendant's activities deprived him of his constitutional rights, "[were] without observance of procedure required by law, [were] unwarranted by the facts and constituted arbitrary and capricious behavior and an abuse of discretion on the part of Defendant" which, in turn, violated both the APA and 38 U.S.C. § 4110. Compl. ¶ 50. Hence, as a whole, plaintiff s complaint does not appear to rely on 38 U.S.C. § 4110, the Constitution or other VA regulations and internal policies for his jurisdictional basis. It is understandable, however, if one is confused by precisely what relief plaintiff seeks and upon what provision of law he relies for jurisdiction, as plaintiff's complaint appears to be convoluted, if not somewhat contradictory. Given that the parties have addressed whether plaintiff may assert jurisdiction based upon 38 U.S.C. § 4110, the Constitution, and other VA regulations and internal policies in their briefs and this court may evaluate jurisdiction at any time, *see Berdick v. United States*, 222 Ct. Cl. 94, 99, 612 F.2d 533, 536 (1979), the court will address each contention with regard to jurisdiction.

In his complaint, Dr. Shaller neglects to specify which version of 38 U.S.C. § 4110 he relies upon for support. By Pub.L. 102-40, Title IV, § 401(a)(3), 105 Stat. 210, Congress

repealed and recodified the section of 38 U.S.C. § 4110 relating to the disciplinary boards for the Department of Medicine and Surgery (DMS) (now the Veterans Health Administration) on May 7, 1991. *See* 38 U.S.C. § 4110 (2001) (directing the reader, in the Historical and Statutory Notes, to 38 U.S.C. § 7461 (1991) which concerns the disciplinary and grievance procedures of the VHA personnel (section 7401 employees, which includes physicians)). The critical events giving rise to plaintiff's cause of action occurred between March 1988 and January 1991, prior to Congress' amendment and recodification of 38 U.S.C. § 4110. Therefore, this court can only conclude that plaintiff intends to rely upon the prior, more applicable version of 38 U.S.C. § 4110 in support of his claims.

Unfortunately, plaintiff cannot rest his claim for jurisdiction in this court upon the prior version of 38 U.S.C. § 4110. This court has stated that "[t]he only inescapable principle is that Congress' [s] waiver of sovereign immunity with respect to money compensation must be clear or strong before the court can say that the statute mandates compensation." *Mitchell v. United States*, 664 F.2d 265, 268-69 (1981), *aff'd and remanded*, 463 U.S. 206, 103 S. Ct. 2961, 77 L.Ed.2d 580 (1983). The applicable version of 38 U.S.C. § 4110 concerns the disciplinary boards for the Department of Medicine and Surgery. The statute discusses the organization of the board, the board's duties, and an individual's right to appeal the board's disciplinary action administratively. 38 U.S.C. § 4110 (1991). It in no manner mentions compensation or any right to recovery for damage sustained; hence, the statute fails to express, either directly or by implication, that a party has a right to any compensation for any damage sustained. *See Testan*, 424 U.S. at 400, 96 S. Ct. at 955 (citation omitted); *Eastport*, 372 F.2d at 1007. Accordingly, this court is constrained to agree with defendant in the conclusion that 38 U.S.C. § 4110 is not a money-mandating statute as the statutory provision does not contain

a clear indication of Congress' intent to waive sovereign immunity with respect to a monetary compensation claim.[5]

Likewise, defendant contends that the VA regulations and policies plaintiff cites in his complaint are not money-mandating provisions upon which plaintiff may rest his claims. Defendant is correct. While plaintiff brings his action pursuant to VA employment regulations as set forth in the United States Code, he is not specific as to which regulations would apply to this action. Also, plaintiff cites a laundry list of various internal VA policies. A review of the titles of the cited policies reflects that they concern investigative and administrative procedures, and in and of themselves, are not money-mandating in any manner.[6] Moreover, plaintiff cites to sections 1.450-1.455 of Title 38 of the Code of Federal Regulations (CFR).[7] Even the most basic review of these

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[5] Even if plaintiff seeks to rely upon the current version of 38 U.S.C § 4110, such reliance must fail. Title 38 U.S.C. § 4110 is currently entitled "Advisory Committee on Veterans Employment and Training." Section 4110 concerns the establishment of the advisory committee and the committee's duties. Nothing in this statute, either expressly or by implication, "can be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 400, 96 S. Ct. at 955 (citation omitted); *Eastport*, 372 F.2d at 1007. Thus, this court must also conclude that the current version of 38 U.S.C. § 4110 also falls short of being money-mandating.

[6] Plaintiff cites to "MP-1, Part I, Chapter 2, VA Investigation Policy; the Inspector General Act of 1978; Department of Medicine and Surgery's Administration Letter, IL 13-82-8, SUBJ: Administrative Investigations; MP-1, Part I, Chapter 15, Office of Inspector General Complaint Center; Department of Medicine and Surgery's Security Service Guide for Conducting Administrative Investigations, dated August 20, 1988 . . . Department policies for Disciplinary Actions, Grievances and Hearings (MP-5, Part II)." Compl. at ¶ 1.

[7] Title 38 C.F.R. §§ 1.450-1.455 (1990-91) are subcaptioned as follows: "Jurisdiction and responsibility for investigation"; "Functions of Investigation Service"; "Authorizations for investigations, surveys and special studies"; "Cooperation of all officials on investigation"; "Unauth-

regulations reveals that none of them can be interpreted as mandating compensation for an injury. These regulations concern investigation procedures and witnesses; they do not mandate any form of compensation.

Given the fact that the cited VA regulations and policies do not themselves grant a right to compensation, this court must conclude, as it did in the previous section, that plaintiff is also precluded from reliance upon the cited VA regulations and policies to support his claim of jurisdiction in this court.

g. COFC Lacks Jurisdiction to Review the Exclusive Remedies Set Forth in 38 U.S.C. § 4110 for Plaintiff's Reinstatement and Back Pay Claims

1. Plaintiff Presents a Cognizable Back Pay Act Claim.

Thus far, this court has addressed defendant's jurisdictional challenges to plaintiff's complaint, with the exception of defendant's constitutional challenges, which this court will discuss, *infra*. The court notes, however, that defendant fails to acknowledge that plaintiff has presented a cognizable claim for back pay. This court, pursuant to RCFC 8(f) must construe all pleadings so "as to do substantial justice." Consistent with this rule, "[t]he allegations of a complaint must be read as a whole and construed liberally." *Int'l Fidelity Ins. Co. v. United States*, 27 Fed. Cl. 107, 109 (1992). In this vein, the court has reviewed plaintiff's complaint as a whole and finds that, while not well-pled, he does present a back pay claim pursuant to the Back Pay Act, 5 U.S.C. § 5596.

In his prayer for relief, plaintiff seeks back pay, retroactive pay, reimbursement, compensation for any promotions he would have received but for his discharge, and reinstatement, among other things. Such requests are equivalent to a direct claim for back pay pursuant to the Back Pay Act, along with

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orized disclosure of investigative information"; and "witnesses required to read and sign transcript".

collateral relief often sought in connection with a back pay claim. *See Khan v. United States*, 201 F.3d 1375, 1378 (2000) (construing plaintiff's claim stating that he wished to be "restored to active service with the [VHA] in the prior position and that his service credit be amended to accurately reflect full service [from date of retirement] to the present" as "a claim for reinstatement and back pay based on involuntary retirement."); *Finkelstein v. United States*, 29 Fed. Cl. 611, 615 (1993) (stating that "[r]einstatement and correction of records are remedies that may be awarded by this court incident to the award of back pay, under 28 U.S.C. § 1491(a)(2)"). In keeping with the principle of RCFC 8(f) that a complaint shall be construed liberally, this court finds that since plaintiff's complaint requests back pay and reinstatement, as well as other relief, despite plaintiff's failure to directly seek relief pursuant to the Back Pay Act, plaintiff has given defendant sufficient notice that he presents a back pay claim. In fact, if one looks at plaintiff's complaint as a whole, the gravamen of his complaint requests back pay and reinstatement, among other monetary and non-monetary remedies, based on violation of due process, specifically the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution, 38 U.S.C. § 4110, and various VA regulations and policies. Thus, since this court may evaluate subject matter jurisdiction *sua sponte*, RCFC 12(h)(3), the remaining query is whether this court may entertain plaintiff's back pay claim in any respect.

2. Title 38 U.S.C. § 4110 Provides an Exclusive Remedy for Plaintiff's Claims

An examination of the applicable statutory provisions demonstrates that, in this case, exclusive administrative review procedures were mandated and preclude any review of the agency's determination by this court. For VA medical personnel appointed under 38 U.S.C. § 4104(1), such as Dr. Shaller, 38 U.S.C. § 4110 provides a specific, mandatory

procedure for challenging an adverse agency action based upon charges of inaptitude, inefficiency or misconduct. There is no dispute about the fact that the charges which resulted in plaintiff's discharge fell within those particular categories. The pertinent statutory language states:

> § 4110 Disciplinary boards
>
> (a) The Chief Medical Director, under regulations prescribed by the Administrator shall from time to time appoint boards to be known as disciplinary boards . . . to determine, upon notice and fair hearing, charges of inaptitude, inefficiency, or misconduct of any person employed in a position provided in paragraph (1) of section 4104 of this title. . . .
>
> (d) A disciplinary board, when in its judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action . . . which shall include reprimand, suspension without pay, reduction in grade, and discharge . . . . The Administrator shall cause to be executed such action as the Administrator approves. The decision of the Administrator shall be final.

Thus, under the provisions of 38 U.S.C. § 4110, Dr. Shaller was required to bring an appeal of his discharge through the exclusive grievance procedures of section 4110. The leading case addressing the requirement of a VA physician hired pursuant to 38 U.S.C. § 4104(1) to exhaust the mandatory requirements of section 4110 is *Heany v. United States Veterans Admin.*, 756 F.2d 1215 (5th Cir. 1985). In *Heany* the plaintiff alleged that his First and Fifth Amendment rights were violated by the suspension of his surgical privileges. The Fifth Circuit observed that Veterans Administration physicians receive fewer procedural protections than other federal employees who are governed under the provisions of the CSRA. The court further determined that Congress sought to treat VA professionals such as physicians, dentists, and

surgeons, different than other civil employees as was evidenced by the different pay scale for professionals ("38 U.S.C. § 4118 (Supp. V. 1976)"); the discretionary nature of professionals' appointments ("38 U.S.C. § 4104 (Supp. V. 1976)"); professionals' exemption from "other civil service requirements for qualifications;" and the fact that the VA Administrator is "allowed more discretion in disciplining and discharging employees under the DMS regulations than is allowed to administrators under the CSRA." *Heaney*, 756 F.2d at 1218 (citing *Orloff v. Cleland*, 708 F.2d 372 (9th Cir. 1983)).

The court also found the process of appealing a disciplinary board's decision to be instructive. After going through the mandatory disciplinary process, pursuant to 38 U.S.C. § 4110, an employee may appeal the board's decision to the VA Administrator, whose determination is the final decision of the agency. 38 U.S.C. § 4110(d). An employee may appeal the Administrator's final decision to federal court pursuant to 5 U.S.C. § 702, 706. *Heaney*, 765 F.2d at 1219. The federal court may reverse this decision upon a finding that the VA has not afforded the employee procedural due process "as provided by statute, regulation, and the Constitution, or where the decision was arbitrary or capricious." *Id.* (citing *Moore v. Custis*, 736 F.2d 1260 (8th Cir. 1984); *Gilbert v. Johnson*, 601 F.2d 761 (5th Cir. 1979)).

Based upon this review of the DMS regulations, the court determined that:

> The structure of the scheme . . . is designed to allow the DMS to discipline unsatisfactory or disqualified employees holding positions such as Heaney's without the restrictions pertaining to the civil service. Accordingly, we must recognize that to allow a nonstatutory damage remedy here would have some effect tending to upset the balance between the interests of maintaining quality

> medical personnel and the protection of constitutional rights struck by Congress in creating the DMS.

Id. (footnote omitted). *See also Berry v. Hollander*, 925 F.2d 311 (9th Cir. 1991). Thus, the Fifth Circuit determined that Heaney was entitled to only that relief which was afforded him by the VA statutory and administrative remedies.

Also, very much on point in this instance and analogous to the *Heany* case, is the Federal Circuit's opinion in *Khan v. United States*, 201 F.3d 1375 (Fed. Cir. 2000). The *Khan* case involved a VA physician who, like Dr. Shaller, was appointed under the provisions of 38 U.S.C. § 4104(1) and who, like plaintiff, filed a claim against the agency for reinstatement and back pay. The Federal Circuit held that VA health care professionals specified under section 4104(1) of title 38 are hired, paid, and disciplined under a system separate from that covered by the CSRA and that the CSRA does not normally provide a remedy for the involuntary retirement (or dismissal) of such health care professionals. Instead, the court held, as a VA physician, appointed under 38 U.S.C. § 4104(1), Dr. Khan was restricted to the grievance procedures set forth in 38 U.S.C. § 7463 (1994).[8]

Specifically, the Federal Circuit determined that 38 U.S.C. § 7462 (covering major adverse actions involving questions of professional conduct or competence) and § 7463 (covering other major adverse actions) both mandate that any grievance resulting from a major adverse action must be filed with the agency under the procedures set forth in the respective

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[8] Following the enactment of the Department of Veterans Affairs Health-Care Personnel Act, Pub. L.102-40,105 Stat. 239, 241 (1991), the section numbers comprising 38 U.S.C. §§ 4101-4168 were renumbered and recodified at 38 U.S.C. §§ 7401 et seq. Although Dr. Shaller, unlike Dr. Khan, is covered under the earlier provisions, for purposes of the controlling legal issues involved in these two cases, the grievance procedures set forth in section 4110 do not differ in any substantive manner from those set forth in sections 7462 and 7463.

sections. The Federal Circuit also held that health care professionals hired under 38 U.S.C. § 4104(1) (recodified as section 7401(1)) are excluded from the competitive service under the provisions of title 38 and are therefore not entitled to appeal adverse actions (e.g., involuntary retirements and removals) under chapter 75 of title 5 of the United States Code before the MSPB. Having established that the grievance procedures set forth in 38 U.S.C. §§ 7462 and 7463 are mandatory and that the CSRA provides no avenue of appeal, the Federal Circuit finally held that 38 U.S.C. § 7463 (the provision which applied to Dr. Kahn) created an exclusive remedy for section 7401(1) personnel. Clearly, by the most simple logical extension, the same holds true for 38 U.S.C. § 7462, as well as its predecessor, 38 U.S.C. § 4110. Thus, in accordance with the Federal Circuit holding in *Khan* and with the Fifth Circuit's determination in *Heany*, this court finds that the grievance procedures set forth in 38 U.S.C. § 4110 are both mandatory as well as exclusive and that Dr. Shaller is precluded from any appeal from the agency to the MSPB under the CSRA or to this court under the Tucker Act. *See Khan*, 201 F.3d at 1381.

3. Plaintiff May Only Seek Judicial Review in the District Court.

Lastly, defendant contends that plaintiff may only seek judicial review in district court. Defendant is correct in its contention. While this court may, in some instances, review an agency action by following the framework provided in the APA, as stated, *supra*, this court "only may follow the APA judicial review framework where plaintiffs have a money damages claim stemming from agency action and cognizable under the Tucker Act." *Pender Peanut Corp. v. United States*, 20 Cl. Ct. 447, 452 n.3 (1990). Inasmuch as it has been determined that plaintiff may not seek damages other than those provided for by the DMS regulations and may only seek judicial review to determine whether due process was given

or whether the agency action was arbitrary and capricious, plaintiff may not bring his claim for back pay in this court. In addition to this court's lack of jurisdiction to hear Dr. Shaller's claim for back pay, the COFC further lacks jurisdiction to offer Dr. Shaller a judicial review of the VA Administrator's final decision pursuant to the APA. Jurisdiction for such a review rests solely with the appropriate district court. *See Khan*, 201 F.3d at 1382 (finding that Khan could seek judicial review of his involuntary retirement action in district court pursuant to the APA even though neither the CSRA nor the Tucker Act provided any avenue of relief before the COFC) (citing *Berry*, 925 F. 2d at 315).

This court notes that while this court possesses the power to transfer this case back to the district court under the provisions of 28 U.S.C. § 1631, the court declines to do so inasmuch as: (1) neither party has ever made such a request; (2) plaintiff has brought eight separate, unsuccessful suits before the district court on these matters, already; and (3) when the district court offered plaintiff the option during the eighth lawsuit to retain the case in district court, plaintiff chose not to remain. Accordingly, this court will not transfer this case back to district court because it does not appear to be in the interests of justice to do so.

h. Plaintiff May Not Rely Upon the Cited Constitutional Provisions Alone.

Plaintiff also brings this action pursuant to the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution. Defendant argues that this court lacks jurisdiction over plaintiff's constitutional claims and its argument in that regard is well taken. It is well-settled that "constitutional claims 'standing alone,' i.e., without an underlying statutory or regulatory right to recovery, `cannot be interpreted to command the payment of money' and therefore cannot support the Court of Federal Claims' jurisdiction under the Tucker Act." *Hamlet v. United States*, 63 F.3d 1097, 1107

(Fed. Cir. 1995), *cent. denied*, 517 U.S. 1155, 116 S. Ct. 1541, 134 L.Ed.2d 646 (1996) (quoting *United States v. Connolly*, 716 F.2d 882, 886-87 (Fed. Cir. 1983) (*en banc*)) (citing *CAFC Hamlet I*, 873 F.2d 1414, 1416-17 (Fed. Cir. 1989)).[9] In the instant case plaintiff has not presented this court with an underlying statutory or regulatory right to recovery, as determined, *supra*. Because plaintiff has

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[9] Indeed, both this court and the Federal Circuit have held that each of the cited constitutional provisions alone are not money-mandating. *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir.1983), *cert. denied*, 465 U.S.1065,104 S. Ct.1414, 79 L.Ed.2d 740 (1984) (finding that the First Amendment alone does not mandate compensation; it "merely forbids Congress from enacting certain types of laws; it does not provide persons aggrieved by governmental action with an action for damages in the absence of some other jurisdictional basis.") (citing *Featheringill v. United States*, 217 Ct. Cl. 24, 32 (1978); (additional citation omitted)); *Fireman v. United States*, 49 Fed. Cl. 290, 292 (2001) (following *Connolly* for the proposition that the First Amendment, without more, is not a money-mandating provision); *Hamlet*, 63 F.3d at 1107 (finding that the First and Fifth Amendments "standing alone" are not money-mandating and thus cannot support jurisdiction in this court); *Rosano v. United States*, 9 Cl. Ct.137,142 (1985), *aff'd*, 800 F.2d 1126 (Fed. Cir.1996) (stating that "violation of the First Amendment does not state a claim within the jurisdiction of the Claims Court, as `except for the taking clause of the fifth amendment [,] the other amendments do not require the United States to pay money for their alleged violation") (quoting *Elkins v. United States*, 229 Ct. Cl. 607, 608 (1981); (additional citation omitted)); *McPherson v. United States*, 2 Cl. Ct. 670, 672-73 (1983) (stating "[t]he Sixth Amendment right to counsel is clearly not a Constitutional provision obligating the federal government to pay money damages for a violation thereof.") (citing *Walton v. United States*, 213 Ct. Cl. 755, 757 (1977); *Muehlen v. United States*, 209 Ct. Cl. 690, 529 F.2d 533 (1976); *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007-09 (1967)); *Osborn v. United States*, 47 Fed. C1.224, 232 (2000) (determining that the Equal Protection Clause of the Fourteenth Amendment does not mandate compensation and thus cannot be relied upon for jurisdiction in this court) (citing 28 U.S.C. § 1491(a)(1); *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir.1995); *Mullenberg v. United States*, 857 F.2d 770, 773 (Fed. Cir.1988); *Richards v. United States*, 20 Cl. Ct. 753, 757-58 (1990)).

presented no claim which secures jurisdiction in this court, his constitutional claims, without more, cannot invoke this court's jurisdiction. Thus, plaintiff may not rely upon either the First, Fifth, Sixth, or Fourteenth Amendments to the Constitution in support of his claims before this court.[10]

CONCLUSION

In light of the foregoing, the court hereby ORDERS that:

(1) Defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted is GRANTED.

(2) The clerk of the court shall DISMISS the instant action.

(3) Each party shall bear its own costs.

/s/ Lynn J. Bush
LYNN J. BUSH
Judge

---

[10] Given that the court has determined that the Court of Federal Claims may not hear plaintiffs claims, the court also finds it unnecessary to address plaintiffs request that the court interpret defendant's motion to dismiss as a motion for a more definite statement. Likewise, the court need not address defendant's contention that this court does not have jurisdiction over plaintiffs claims because they sound in tort and that plaintiffs claims should be dismissed on the grounds of *res judicata* and/or collateral estoppel. Lastly, inasmuch as the court has determined that it lacks jurisdiction to entertain plaintiffs claim, the court need not address defendant's argument that plaintiff failed to state a claim upon which relief can be granted.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Jun. 6, 1997]

No. 3:CV-96-0076
(Judge Kosik)

DAVID A. SHALLER, M.D.,
Plaintiff,

v.

UNITED STATES OF AMERICA
(Department of Veterans Affairs),
Defendant.

STIPULATION

AND NOW, this 13th day of June, 1997, it is hereby agreed and stipulated between the parties that the within matter will be transferred in its entirety to the United States Court of Claims, pursuant to 28 U.S.C. § 1491(a).

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BY THE COURT:
/s/ Edwin M. Kosik
HONORABLE EDWIN M. KOSIK

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Feb. 26, 1997]

Civil No. 96-0076
(Judge Kosik)

DAVID A. SHALLER, M. D.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM

Before the court is the defendant's motion to dismiss. For the reasons which follow, the motion to dismiss will be granted in part and denied in part.

Background

Plaintiff, David A. Shaller, M.D., filed a complaint in the instant action on January 16, 1996.[1] The basis of plaintiff s action is his termination by the Department of Veterans Affairs effective November 13, 1990. Plaintiff brings the action pursuant to the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, the Administrative Procedures Act, 5 U.S.C. § 701 et seq. [hereinafter the "APA"], 28 U.S.C. § 1346(a)(2), 38 U.S.C. § 4110 and other relevant Department of Veterans Affairs employment regulations.

---

[1] We note that this is the eighth action filed against the Department of Veterans Affairs arising out of the same circumstances.

On April 9, 1996, defendant United States of America [Department of Veterans Affairs] filed a motion to dismiss and a brief in support thereof. In support of the motion to dismiss, the defendant raises four arguments, which will be addressed in detail below. On April 22, 1996, plaintiff filed a brief in opposition to the motion to dismiss. No reply brief was filed.

Discussion

Initially, we note that the instant complaint details activities involving the plaintiff's employment as a staff physician at the Wilkes Barre Medical Center which is operated by the Department of Veterans Affairs. While the allegations in the complaint cover circumstances commencing in March of 1988, we agree with the defendant that not all of the allegations are relevant to the instant proceeding and that some of the matters have been addressed in previous actions before this court.[2]

As we indicated earlier, defendant raises several arguments in support of the motion to dismiss. Specifically, defendant argues that the complaint is not timely under the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq.; that the instant action is barred by the doctrine of res judicata; that the instant action should be dismissed for lack of subject matter jurisdiction because sovereign immunity has not been waived in the instant circumstances and that the action should be dismissed for failure to state a claim. In opposition to the motion to dismiss, plaintiff argues that his complaint was timely filed that it sets forth causes of action under 42 U.S.C. § 1985 and

---

[2] Previously, plaintiff has filed actions in this court at 89 CV 1618, 90 CV 2069, 90 CV 727, 90 CV 1985, 92 CV 1589, 93 CV 0108 and 94 CV 1861.

Plaintiff's previous actions have raised allegations under the Privacy Act, 5 U.S.C. § 552a, *et seq.*, have sought injunctive relief pending his administrative appeal, raised violation of his contractual rights and wrongful discharge, and sought relief under the Federal Torts Claim Act.

a claim for judicial review under the Administrative Procedures Act which utilizes the six year statute of limitations set forth in 28 U.S.C. § 2401(a). As to the question of subject matter jurisdiction, plaintiff argues that jurisdiction exists under 28 U.S.C. § 1343 and § 1346(a) (2) as implementing 42 U.S.C. § 1985. Also, plaintiff argues the applicability of 5 U.S.C. § 702. Finally, plaintiff argues that the action should not be barred by the doctrine of res judicata or failure to state a claim.

We note that all of the arguments raised by the defendant and the response of plaintiff are inter--related. Accordingly, we will address the arguments raised in the motion as they relate to the claims set forth by plaintiff in the complaint.[3]

As to plaintiff's argument that he has submitted claims detailing specific causes of action under the First, Fifth, Sixth and Fourteenth Amendments through 42 U.S.C. § 1985, we find these claims to be barred by the statute of limitations. Case law has held that the statute of limitations with respect to a § 1985 conspiracy is two years from each overt act of the conspiracy causing damage. *Dakay v. School District of Cheltenham Township*, 1987 WL 17367 (E.D.Pa.); *Ferguson v. Allstate Engineering Co.*, 1992 WL 211534 (E. D. Pa.).

In the complaint, plaintiff alleges a course of conduct which began in March of 1988 and culminated in plaintiff's termination effective November 13, 1990.[4] Because the instant action was not filed until January 16, 1996, we find plaintiff's claims under 42 U.S.C. § 1985 to be barred by the statute of limitations.

---

[3] We also note that plaintiff has filed a convoluted complaint whose allegations span several years. The court will try to ascertain the nature of plaintiff's claims.

[4] While plaintiff did pursue administrative remedies in order to satisfy the exhaustion requirement for other statutory claims presented in other actions, there are no exhaustion requirements under the civil rights statutes.

Plaintiff's complaint also appears to seek review of plaintiff's discharge under the Administrative Procedures Act, 5 U.S.C. § 702 and 38 U.S.C. § 4110.[5] In considering plaintiff's claims for review of the actions taken by the Department of Veterans Affairs, and his request for relief, namely, reinstatement, restoration of benefits, expungement of the record, as well as back pay, retroactive pay, reimbursement and interest, in light of defendant's motion to dismiss, this court must address the issues of subject matter jurisdiction, the statute of limitations, and the standard of review.[6]

Initially, we consider whether this court has jurisdiction over plaintiff's claims. The APA, 5 U.S.C. § 702, provides that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 38 U.S.C. § 4110 provided for the appointment of disciplinary boards to conduct hearings and make recommendations regarding actions against certain employees relating to employment status.[7]

Case law has held that a Veterans Administration employee was entitled to judicial review of personnel decisions. *Ward v. Derwinski*, 837 F.Supp. 517 (W.D.N.Y. 1992); *Gilbert v. Johnson*, 419 F.Supp. 859 (N.D.Ga. 1976), *aff'd in part and rev'd in part*, 601 F.2d 761, 764 (5th Cir. 1979), *cert. denied sub nom.*; *Gilbert v. Cleland*, 445 U.S. 961 (1980).[8] However,

---

[5] 38 U.S.C. § 4110 was repealed. Pub.L. 102-40, Title IV, § 401(a)(3), May 7, 1991, 105 Stat. 210. Disciplinary and grievance procedures are now covered by 38 U.S.C. § 7461 *et seq.*

[6] While defendant also raises the issues of res judicata and failure to state a claim, we find no merit to these arguments.

[7] We note that defendant does not dispute that plaintiff is included in the category of employees covered by § 4110.

[8] We note that while § 4110 did not specifically provide for judicial review, its successor § 7462(f)(1) does make provision for judicial review of a final order of a disciplinary appeals board (as reviewed by the secretary).

because plaintiff is seeking monetary relief, as well as injunctive relief, and asserts jurisdiction pursuant to 28 U.S.C. § 1346(a)(2), this court must determine whether jurisdiction in the instant action rests in the district court or the Court of Claims.

In order to determine where jurisdiction over the instant action properly lies, this court must begin its analysis with the Tucker Act, 28 U.S.C. §§ 1346(a) (2) and 1491. Case law has held that the Tucker Act creates no substantive right of recovery, but waives sovereign immunity and defines the limits of federal jurisdiction in actions against the United States for non-tort money damages. *See Hahn v. United States*, 757 F.2d 581, 588 (3d Cir. 1985), *citing United States v. Testan*, 424 U.S. 392 (1976).

28 U.S.C. § 1346(a)(2), the section on which plaintiff relies, states in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . .
>
> (2) Any.other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

Plaintiff's claims against the United States are based on 5 U.S.C. § 701 *et seq.* and 38 U.S.C. § 4110. These claims include requests for non-tort money damages, as well as injunctive relief.

The APA, 5 U.S.C. § 702, provides that "[A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of

a relevant statute, is entitled to judicial review thereof." Section 702 goes on to state that "[A]n action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." [emphasis added].

Thus, to the extent that plaintiff seeks declaratory or injunctive relief, this court has jurisdiction over the instant action. *Chabal v. Reagan*, 822 F.2d 349 (3d Cir. 1987); *Hahn v. United States*, 757 F.2d 581 (3d Cir. 1985). However, plaintiff also seeks back pay, retroactive pay, reimbursement and interest in excess of $10,000. Backpay has been characterized as money damages and thus under the auspices of the Tucker Act. *See Saraco v. Hallett*, 831 F.Supp. 1154 (E.D.Pa. 1993), *aff'd* 61 F.3d 863 (Fed. Cir. 1995), *cert. denied* ___ U.S. ___, 116 S.Ct. 1565 (1996); *Hubbard v. Environmental Protection Agency*, 982 F.2d 531, 536 (D.C.Cir. 1992).

Jurisdiction over claims for money damages against the United States, such as plaintiff's claims for backpay, retroactive pay and reimbursement are governed by the Tucker Act. Where such claims exceed $10,000, the Court of Claims has exclusive jurisdiction. *Zellous v. Broadhead Associates*, 906 F.2d 94 (3d Cir. 1990).

The instant plaintiff alleges damages in excess of $750,000.00. Because plaintiff's monetary claim against the United States is in excess of $10,000, this court does not have jurisdiction under the Tucker Act.

Having determined that this court lacks jurisdiction over the plaintiff's monetary claims, we note that it is the policy in this Circuit to permit plaintiff to exercise a choice as to

whether to proceed in the district court or in the Court of Claims. *See Chabal v. Reagan, supra; Hahn v. United States, supra.* Accordingly, we will allow plaintiff ten days to advise the court if he wishes to waive damages in excess of $10,000 so that this court may retain jurisdiction over the monetary claims or whether he wishes this court to transfer those claims to the Court of Claims pursuant to 28 U.S.C. § 1631.

Having determined that this court has jurisdiction over plaintiff's claims for injunctive relief, we must now determine whether plaintiff's claims are timely. We agree with plaintiff that the statute of limitations on the APA claims is six years. 28 U.S.C. § 2401. *Dougherty v. U.S. Navy Board for Correction of Naval Records*, 784 F.2d 499 (3d Cir. 1986). *June v. Secretary Navy*, 557 F.Supp. 144 (M.D.Pa. 1982). In the instant action, the plaintiff is seeking review of the recommendation of the Disciplinary Board dated October 31, 1990 and of the decision of the Chief Medical Director of the Department of Veteran's Affairs discharging the plaintiff effective November 13, 1990. The instant action was commenced on January 16, 1996. Accordingly, the instant action was commenced within the applicable statute of limitations.

Finally, having determined that this court has jurisdiction over the nonmonetary claims and that the action is not barred by the statute of limitations, the only outstanding question involves this court's scope of review. Because neither party has addressed the question of the scope of review of plaintiff's claims under the APA, we will deny the defendant's motion to dismiss and direct the parties to brief the issue of this court's scope of review and to include all documents necessary to support their respective contentions.[9]

---

[9] We strongly admonish counsel for their superficial treatment of the question of this court's jurisdiction and we expect that counsel will present cogent legal analysis with appropriate citations to support their contentions on the issue of our scope of review. *See e.g. Moore v. Custis*, 736 F.2d 1260 (8th Cir. 1984); *Ward v. Derwinski*, 837 F.Supp. 517 (W.D.N.Y. 1992).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Feb. 26, 19997]

Civil No. 96-0076
(Judge Kosik)

DAVID A. SHALLER, M.D.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

NOW, THEREFORE this 26th day of February, 1997 IT IS HEREBY ORDERED THAT:

[1] the defendant's motion to dismiss is granted in part and denied in part;

[2] plaintiff's claims under 42 U.S.C. § 1985 are dismissed, but plaintiff's claims for review of the administrative proceedings will remain:

[a] As to the monetary claims, the plaintiff is directed to notify this court in writing within ten [10] days whether he wishes to waive damages in excess of $10,000 so that this court may retain jurisdiction over the monetary claims or whether he wishes this court to transfer these claims to the Court of Claims pursuant to 28 U.S.C. § 1631.

[b] As to the nonmonetary claims, the parties are directed to brief the issue of this court's scope of review and to include all documents necessary to

support their respective contentions in accordance with the attached Memorandum within thirty [30] days of the date of this Order.

/s/ Edwin M. Kosik
EDWIN M. KOSIK
United States District Judge

APPENDIX F

Union Calendar No. 597

102d Congress, 2d Session
House Report 102-1062

CONTINUING DEFICIENCIES IN THE DEPARTMENT OF VETERANS AFFAIRS MEDICAL QUALITY ASSURANCE PROGRAM

THIRTY-EIGHTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

together with

ADDITIONAL VIEWS

NOVEMBER 9, 1992.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1992

60-257

D. THE DVA DISCOURAGES THE REPORTING OF POOR QUALITY CARE BY HARASSING WHISTLEBLOWERS OR FIRING THEM

According to Tom Devine, director of the Government Accountability Project, "The Department of Veterans Affairs is a leader on the merit system anti-honor roll for one simple reason: free speech repression has been a way of life at this agency." [42] The subcommittee's investigation of the treatment of whistleblowers by the DVA confirms this characterization. Honest employees have had their jobs eliminated and their lives destroyed because they attempted to expose poor patient care.

* * * *

Dr. David Shaller, a rheumatologist at the DVA hospital in Wilkes-Barre, PA, was fired for attempting to expose poor patient care. Dr. Shaller complained about the transfer of seriously ill patients to the facility's nursing home care unit, which he believed was not equipped to care for the patients.[48]

The hospital investigated Dr. Shaller's allegations and concluded they had no validity. He appealed their decision to the regional office on July 8, 1988. Several weeks later, the DVA inspector general received anonymous allegations charging Dr. Shaller with sexual misconduct. The allegations were disproved.[49]

Two months later, Dr. Shaller was assigned to nursing duties in the hospital. When he discovered additional patient care problems, he reported them to Central Office. He also reported the allegations to another DVA physician and the head of a medical commission. He was fired for releasing patient information, even though he was attempting to obtain better treatment for the patients.[50]

The committee believes these examples are typical of the treatment received by DVA whistleblowers.

* * * *

The committee believes that, in light of the failure of the DVA quality assurance system to prevent and correct poor medical treatment, the Department's punishment of personnel who attempt to expose poor quality care closes out the last possible mechanism within the hospital system to address problems. Unless the DVA changes its policies and procedures, the poor quality of care provided to veterans will remain known only to those who provide it.

* * * *

The subcommittee's investigation revealed the deplorable treatment of medial personnel who attempt to expose poor quality care. DVA management has often behaved unconscionably in punishing whistleblowers, and has acted with impunity.

* * * *

Moreover, the committee strongly recommends that the Secretary of Veterans Affairs review the Department's record in the handling of whistleblowers and provide guarantees that such retaliation will no longer be tolerated.

Supreme Court, U.S.
FILED
OCT 30 2003
OFFICE OF THE CLERK

No. 03-70

IN THE

Supreme Court of the United States

DAVID A. SHALLER, M.D.
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR REHEARING

DAVID A. SHALLER, M.D.
Pro se
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IN THE

Supreme Court of the United States

No. 03-70

DAVID A. SHALLER, M.D.

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR REHEARING

REASONS FOR GRANTING THE PETITION FOR REHEARING

The Court should consider and grant this Petition for Rehearing because it puts forth "substantial grounds not previously presented" in the Petition for Certiorari:

1. A Constitutional Violation of Substantive Due Process.

A constitutional violation of substantive due process is presented along with the *sole* "evidence of record" relied upon by the Department of Veterans Affairs (DVA) to fire Plaintiff.

This "record" should properly be considered by The Court in its determination. Plaintiff believes when this "record" is properly considered, the DVA's action will be shown to be so manifestly arbitrary and conscience-shocking, it rises to the level of a constitutional violation of substantive due process which warrants This Court's intervention.

This Court has recognized "time and again that the touchstone of due process is protection of the individual against arbitrary action of the government."[1]

This Court provided "guideposts" to identify government action that "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense."[2]

The Court reasoned that whether a government action "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense" requires a determination on a case-by-case basis with "the utmost care."[2]

". . . Only a purpose to cause harm unrelated to the legitimate . . . [official purpose] . . . will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."[1]

". . . For executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[1]

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[1] *County of Sacramento v Lewis*, 523 U.S. 833, 845 (1998).

[2] *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 128 (1992).

Plaintiff's matter passes this test. Simply put, he was fired for being a responsible and conscientious physician, faithful to the Code of Medical Ethics and the government's own Code of Ethics.

Plaintiff was fired because of his letter to the DVA's Inspector General of December 30, 1988.[3] This letter was the *sole "evidence of record"* the DVA used to justify the firing. The DVA's campaign of retaliation began after the ventilator incident in March, 1988,[4] continued through his firing in January, 1991, and persists to this day.

THE LETTER

Plaintiff's letter of December 30, 1988 to Mr. Kroll of the Office of Inspector General reported continued mismanagement, negligence, and malpractice at the Wilkes-Barre VA Hospital. It evidenced another Nurse Practitioner resignation (she was the fourth), and documented physicians' futile attempts to obtain Plaintiff's expertise in serious medical cases. One ophthalmologist promptly called Plaintiff's supervisor who refused her plea for Plaintiff to see her in-patients. All in-patient rheumatology consultations were denied and scheduled as outpatients. This administrative decision jammed the outpatient clinics.

Representative cases were attached to the letter as documentation. They were copied from patient's charts and inadvertently included their name and hospital number. The DVA's decision prohibiting Plaintiff from treating all in-patients cost Robert Adams his life.[5]

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[3] Appendix.

[4] Petition for Certiorari, footnote #2. pg. 2-3.

[5] Petition for Certiorari, footnote #8. pg. 9.

CAMPAIGN OF RETALIATION WITH INTENTION TO HARM[6]

The DVA perpetrated an open campaign of retaliation, calculated to visibly damage Plaintiff's personal and professional life and thereby "discourage" others from interfering with management's decisions.[7] This involved illegal activity such as bringing knowingly false charges of sexual misconduct (charges were "anonymous"), altering tapes and transcripts of Inspector General hearings (confirmed by the FBI), issuing false W-2 statements (confirmed by the IRS), and mail tampering (confirmed by the Postal Inspector).

Particularly egregious was DVA's flagrant abuse of authority whereby Plaintiff was assigned nursing duties, and later reassigned to rewrite expired prescriptions, while prohibiting his treatment of seriously ill hospitalized patients requiring his expertise. The intentional and reckless disregard for patients caused deaths, resulting in large malpractice awards.[8] The management practices were implemented nationwide, contributing to increased malpractice and malpractice claims paid, nationwide.[9]

The gravest and most egregious harm to Plaintiff was being wrongly fired for allegedly "violating" the Privacy Act;[10] an

---

[6] Summarized from Plaintiff's sworn and unrefuted congressional testimony before the House Government Operations Subcommittee on Human Resources and Intergovernmental Relations. Washington, DC. November 20, 1991.

[7] In 1988, the DVA instituted monetary incentives to reward "efficient" hospital administrators. Thereafter, administrative decisions grievously interfered with patient care, contributing to malpractice and deaths.

[8] *Id.* at 4 and 5.

[9] Petition for Certiorari, footnote #13, pg. 12.

[10] The Privacy Act 5 U.S.C. § 552a. (b)(8) and (b)(9) permit disclosure:

"(b)(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such

allegation that is unequivocally false on its face. A mere read of the law shows there was no violation and *all* the named veterans or surviving widows provided statements that they "were grateful for Dr. Shaller's action on their behalf".

Nevertheless, a "disciplinary board" embarked on a series of "disciplinary hearings" spanning many months, contravening DVA regulations. One veteran testified that his suffering caused "enough pain to take suicide" and provided compelling testimony supporting Plaintiff's letter. After that, testimony from other veterans or surviving widows was prohibited. The DVA's attorney was compelled to remark that "due process did not apply".

The "disciplinary board" then made a "legal judgment" that the attachments to Plaintiff's letter sent to two[11] of the five individuals copied constituted "a violation of the Privacy Act".[12] The DVA's "disciplinary board" were non-peers, with

---

disclosure notification is transmitted to the last known address of such individual:

(b)(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee."

[11] (1) Paul W. Schafer, M.D., Director, National, Association of VA Physicians (who was also a VA physician) and (2) Ambassador Bruce Laingen, Executive Director, National Commission on the Public Service. Chartered by Congress, this commission was also known as the Volcker Commission. (Paul Volcker, former Chairman Federal Reserve).

[12] During the hearing, DVA's counsel *admitted* he released unredacted pages from patients' charts, to an unauthorized person without consent. [This is precisely why he was prosecuting Plaintiff!] He was permitted to "recall his mistake".

DVA counsel violated the plain language of The Privacy Act, 5 U.S.C. § 552a. (b)(8), because his release was not pursuant to a showing of compelling circumstances affecting the health or safety of veterans, and he failed to notify them.

This shows the DVA's unequal treatment of its employees.

no legal background or direct patient care responsibilities. It stated:

> "While having in and of itself no potential to harm the individual patients concerned, there has been great and irreparable damage to the Department of Veterans Affairs . . ."

It concluded in a logic defying statement of the absurd:

> "It is the Board's opinion that Dr. Shaller gives no indication that he would be significantly affected by any attempt at rehabilitation. He has shown no remorse."

Plaintiff was then fired by the Secretary, DVA.[13]

Outrageous! Plaintiff did not commit malpractice. He was fired for reporting and trying to prevent it![14] This executive administrative decision is truly conscience-shocking to anyone concerned about patient care, and in due time, we are all patients.

---

[13] However, if there were a violation of the Privacy Act, DVA is obligated to follow its' Regulations For Statutory Offenses: "Discharge will be considered as a mandatory penalty if an employee is tried and convicted of a felony or capital offense by a court of competent jurisdiction . . . Those statutes authorize or prescribe disciplinary and/or criminal penalties . . . Where the statute does not make mandatory the imposition of a specific disciplinary penalty . . . the determination of an appropriate disciplinary penalty will be left to the discretion of the appropriate approving authority." (DM&S Supplement MP-5, Part II June 1, 1964).

So, if a physician were guilty of a statutory violation, the appropriate penalty is prescribed by *that* statute. The Privacy Act authorizes both civil and criminal penalties.

DVA didn't prosecute Plaintiff in a court of law for "violating" the Privacy Act because there was no violation! Instead, it behaved *unconscionably* and publicly fired him. This caused permanent ruin to his career. DVA's *punishment* effectively "discouraged" others.

[14] Physicians determined to have engaged in malpractice were rewarded by promotion and pay increases because they did management's bidding!

The DVA conceded that Plaintiff's letter has "no potential to harm the individual patients." However, it claimed that reporting malpractice to the DVA's Dr. Schafer, and Ambassador Laingen, Chairman of a congressional commission, caused "irreparable damage to the DVA". This is preposterous. Of course, no evidence was presented to support this absurd claim. The finding that Plaintiff showed "no remorse or rehabilitation potential" is ludicrous on its face.

Congress *found*:[15] "THE DVA DISCOURAGES THE REPORTING OF POOR QUALITY CARE BY HARASSING WHISTLEBLOWERS OR FIRING THEM". Plaintiff was identified by name as "typical of treatment received by DVA whistleblowers". Congress' investigation revealed the *deplorable* treatment of medical personal who attempt to expose poor quality care. DVA management has often behaved *unconscionably* in *punishing* whistleblowers, and has acted with impunity."

Thus, Congress *found* Plaintiff's treatment was *deplorable*, and the DVA, acted *unconscionably*, [shockingly unfair or unjust; Webster's dictionary] thereby rising to the level of a constitutional violation of substantive due process.

> "Peer review and reporting through the chain of command does not always work. In theses cases public denunciation or whistleblowing must still be part of the armament of professional ethics. The obligation to blow the whistle, when all else has failed, is grounded in two simple ideas:
>
> First, those who remain silent consent.
>
> Second, the inaction of good people is the main reason why bad people continue to harm others."[16]

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[15] U.S. Congress House Report 102-1062. November 9, 1992. Petition for Certiorari, pg. 58a-60a. Emphasis added.

[16] Health Care Ethics Principles and Problems. Thomas M. Garrett, Harold W. Ballie, Rosellen M. Garrett. Prentice Hall. 1989.

2. A Precedent Setting Case Requiring This Court's Guidance.

This is a precedent setting case and requires the guidance of This Court to delineate the justiciability that Congress intended. There are no reported precedents under the statute at issue; 38 U.S.C. § 7462(f)(1) which provides DVA physicians with judicial review for major adverse actions:

> A section 7401 employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision.

However, Plaintiff was unjustly precluded from judicial review. "Subject matter jurisdiction" was established in District Court. Plaintiff's request for restitution [back pay] exceeded $10,000.00 [ten thousand dollars], and thus fell under The Tucker Act, 28 U.S.C. § 1491(a)(1). Therefore, pursuant to the Tucker Act, and with District Court's finding of "*joint subject matter jurisdiction*", it was transferred to The U.S. Court of Federal Claims which has exclusive jurisdiction under The Tucker Act.

The U.S. Court of Federal Claims spent 5 years considering Defendant's motion to dismiss. Without oral argument, or the ability to present *any* evidence or testimony, the Court dismissed in a 28 page **Unpublished Decision** finding no "subject matter jurisdiction."[17] The appellate Court affirmed.

Traditionally, equity will not suffer a wrong without a remedy. Here, Plaintiff was not afforded the applicable statutory remedy, nor been directed to any court with jurisdiction. The courthouse door was slammed shut!

---

[17] On September 13, 2002, Plaintiff entered a motion to admit evidence on "subject matter jurisdiction". The motion was granted February 4, 2003. The Appeals Court decision (already dictated, typed and mailed) was dated and postmarked February 5, 2003. It is doubtful the evidence (40 pages) was ever considered; thereby causing a *harmful material error.*

There was no adjudication on merit. The language of the statute is absolutely clear and unambiguous. Thus, it appears *The Courts nullified Congress' intent and the law.*

Therefore, This Court's guidance is required to delineate how a wrongly fired DVA physician can obtain judicial review [along with restitution; reinstatement and back pay].

3. The United States Also Has A Compelling Interest To *Justly* Adjudicate This Matter.

A failure to justly adjudicate this matter will exacerbate DVA's recruitment difficulty. A 2003 DVA field survey reported over 900 physician vacancies. [U.S. Medicine Vol. 39 No.9. September 2003]. Congress acknowledges DVA's recruitment crisis: "The U.S. is currently facing a critical workforce shortage in all areas of hospital operations including clinical . . ." [HR 1951: VA Medical Workforce Enhancement Act of 2003].

Graduating physicians considering a DVA career, now have web access to these proceedings. They will learn the Courts decided not to decide Plaintiff's case, despite a statute that explicitly provides DVA physicians with judicial review. This means that the DVA's *deplorable* and *unconscionable* conduct is *perfectly legal*, and can't be challenged. Physicians can be fired on the whim of management, and have no cognizable legal recourse. [Plaintiff was fired for writing a letter to the Inspector General]. After reviewing Plaintiff's case, an international authority determined that the DVA is "unsafe" for practicing physicians until the matter is properly resolved. [The Semmelweis Society International]. As these facts become more widely known, the DVA will be unable to attract and retain a skilled physician workforce.

Plaintiff's matter continues to be a compelling public concern: "A congressional subcommittee looking at VA medical care later cited Shaller as one example of how "honest employees have had their jobs eliminated and their

lives destroyed because they attempted to expose poor patient care." [Pittsburgh Post Gazette: The Cost of Courage: Doctors who spoke out. October 26-29, 2003].

This Court has an opportunity to begin the process to "right the wrong."

CONCLUSION

The petition for rehearing should be granted.

* * * *

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."

Justice Louis D. Brandeis
United States Supreme Court

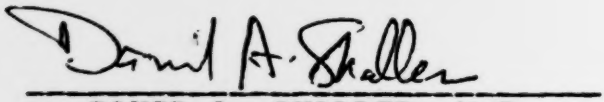
* * * *

Respectfully submitted,

DAVID A. SHALLER, M.D.
Pro se
259 Church Street Apt. 32
Kingston, PA 18704-5331
(570) 287-8524

CERTIFICATE

I certify pursuant to Supreme Court Rule 44.2 that this petition for rehearing is restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented, and that it is presented in good faith and not for delay.



DAVID A. SHALLER, M.D.

APPENDIX A

Medical Center
1111 East End Boulevard
Wilkes-Barre, PA 18711

Veterans Administration

In Reply Refer To:

December 30, 1988

Mr. Jack H. Kroll
Assistant Inspector General for Policy,
Planning and Resources
Office of Inspector General (53E)
Veterans Administration
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Re: IG Control Number 8HO-454

Dear Mr. Kroll:

I reported another Nurse Practitioner resignation to you, in my letter of December 9, 1988, that of Ms. Marcia Ohnesorge. I now enclose a copy of her resignation letter, directed to the Chief of Nursing. It is self-explanatory.

The delivery of Medical care continues to deteriorate in the Nursing Home Care Unit and in the Rheumatology Clinics, at the Wilkes-Barre Veterans Hospital. As you know, Dr. Richardson, my direct supervisor, has assigned me Nurse Practitioner duties, and as a result I have been unable to function as a full-time Rheumatologist. Specifically, I am not permitted to perform Inpatient Consultations. Please see Dr. Brucker's progress note, enclosed.

This is a serious incident, in that Dr. Brucker, as an ophthalmologist, was concerned enough to have me evaluate one of her patient's, for a Rheumatic Disease that can lead to

sudden blindness, Temporal Arteritis. The best this Veterans Hospital had to offer this patient was an outpatient appointment, in May 1989! I've enclosed a sampling of other similar cases.

Well, this got to be quite a problem, so now this Hospital has hired an outside Rheumatologist, at additional cost, to do what the taxpayer is already paying for! As a consequence, my clinics are now backed-up, with a better than 6 month wait for an appointment. I now average 1-2 telephone calls a day from patients asking what's going on. I've enclose a sample letter from one of my patients.

How do you justify assigning a double-boarded physician (Internal Medicine and Rheumatology) Nurse Practitioner duties. and then hiring at additional cost, an outside Rheumatologist to do Inpatient Rheumatology Consultations? Because many of these patients will end up back in my clinic, their quality of care is compromised by lack of continuity. Continuity of care takes on special significance in the treatment of the Rheumatic Diseases, for example, in Rheumatoid Arthritis, in that, therapeutic efficacy is evaluated over long periods of time (months), and serial observations by the same observer enhance the patient's chances of a better outcome.

I believe the above examples represent further mismanagement and retaliatory behavior, on the parts of Dr. Stuart Richardson, Associate Chief of Staff for Ambulatory Care, Dr. William Grossman, Chief of Staff, and Mr. Michael Parrell, Hospital Director.

I hope your Office would address these new concerns which have evolved since my original letter, August 15, 1988. Just a reminder, that my original concerns in that letter, still remain unanswered.

Thank you.

/s/ David A. Shaller, M.D.
DAVID A. SHALLER, M.D.
Chief, Rheumatology Section
Chief Physician, Nursing Home Care

Enclosures: 1. Resignation letter of Ms. Ohnesorge, RN, CRNP, December 6, 1988.
2. Dr. Brucker's Progress note, November 8, 1988. (I have re-typed it for easier reading)
3. Samples (five) of Rheumatology Consultations. (Assignment of Nurse Practitioner duties prohibits performing of Inpatient Consultations.)
4. Sample; a Patient's Letter to me regarding the chaos in the Rheumatology Clinics. (December 16, 1988).

cc: Representative Paul Kanjorski
10 E. South Street Building
Wilkes-Barre, PA 18701

Leonard M. Dribinsky, Esq.
Assistant Special Counsel for Prosecution
Office of The Special Counsel
U.S. Merit Systems Protection Board
1120 Vermont Avenue N.W., Suite 1100
Washington, D.C. 20005

Paul W. Schafer, M.D.
National Association of VA Physicians
3400 International Drive, N.W.
Pod K-2
Washington, D.C. 20008

L. Bruce Laingen
Executive Director
National Commission on the Public Service
1616 H. Street, N.W., Suite 200
Washington, D.C. 20006

John A. Gronvall, M.D.
Chief, Medical Director
Veterans Administration
810 Vermont Avenue, N.W.
Washington, D.C 20420

Date: 12-6-88
To: Chief, Nursing Service
From: Marcia Ohnesorge CRNP

I cannot continue in a work situation in which there is long term lack of attention on the part of both medical and nursing administrations to patient care and safety issues, adequate staffing, and practice safety concerns (1). Demands are unreasonable (2); dialogue is discouraged (3); distortions are common (4); errors continue uncorrected (5). Therefore, I submit my resignation effective 12-9-88.

/s/ Marcia Ohnesorge

(1) Nurse Practitioner memos of 2-9-88, 3-17-88, 5-27-88, 8-29-88, 9-12-88 (two), 11-3-88, 11-17-88, 11-21-88, and grievance statement of 10-17-88.
(2) NP memos of 2-9-88, 5-27-88, 8-29-88, 11-21-88, page 3 of written self evaluation submitted to ACNSEC 8-18-88, NP coverage of VA Nursing Homes 9-88, and grievance statement of 10-17-88.
(3) NP memos of 3-17-88, 10-26-88, 11-17-88.
(4) NP memos of 10-26-88, 11-17-88.
(5) NP memos of 10-26-88, 11-17-88.

6a

Dr. Brucker's Progress Note

11-8-88

Spoke with Dr. Shaller—patient cannot be seen since he's no time for rheumatology consults because of nursing home duties. Dr. Richardson cannot provide coverage for nursing home, in order for Dr. Shaller to do consults.

Plan: Sed Rate
Start on Motrin 600 mg.
Return on Thursday, if sed rate (?)
W. Krause Brucker

Dr. Brucker discussed my unavailability with Dr. Richardson.

MEDICAL RECORD CONSULTATION SHEET

TO: Chief, Medical Service FROM: 5 WEST #24 DATE: 11/14/88

REASON FOR REQUEST: (*Complaints and findings)*

RHEUMATOLOGY CONSULT: 62 y/o/ w/m with h/o COPD on ventilator has persistant low back pain NSAIDS have little effect. Xrays of LS spine reveal no ampression fracture, but steoporests. Please evaluate & advise.

PROVISIONAL DIAGNOSIS:

DX: EMPHYSCMA w/ RESPIRATORY FAILURE REQUIRING MECH. VENTILATION.

DOCTOR'S SIGNATURE: /s/ Dr. Kuchemba

Dr. Kuchemba/sw

CONSULTATION REPORT:

I am unable to see this patient on consultation—
per my supervisor—Dr. Richardson.
Please schedule as an outpatient.

SIGNATURE AND TITLE: /s/ D. Shaller DATE: 11-15-88

PATIENT:

Redaction: The original included patients name & hospital number

Consultation sheet
Standard form 513 (Rev. 9-77

MEDICAL RECORD CONSULTATION SHEET

TO: Chief Medical Service FROM: 7 east bed 22 DATE: 11/10/88

REASON FOR REQUEST: (*Complaints and findings)*

RHEUMATOLOGY CONSULT

39 year old with alcohol abuse and history of hepatitis found to have ankylosing spondylitis in Allentown VA Clinic. Please evaluate and make recommendations.

PROVISIONAL DIAGNOSIS:

hepatomegaly.

DOCTOR'S SIGNATURE: /s/ Dr. Obazee

Dr. Obazee

CONSULTATION REPORT:

(As discussed w/ Dr. Sleth on 11-10-88)

I am unable to see this patient on consultation—

per my supervisor—Dr. Richardson.

Please schedule as an outpatient.

SIGNATURE AND TITLE: /s/ D. Shaller DATE: 11-15-88

PATIENT:

Redaction: The original included patients name & hospital number

Consultation sheet

Standard form 513 (Rev. 9-77

MEDICAL RECORD CONSULTATION SHEET

TO: Chief of Medical Service FROM: 6 WEST DATE: Nov. 10, 1988

REASON FOR REQUEST: (*Complaints and findings)*

RHEUMATOLOGY CONSULT: A 68 year old white male known to you, continues to have left second toe cyanosis, please evaluate if anything else can be offered.

PROVISIONAL DIAGNOSIS:

Scleroderma

DOCTOR'S SIGNATURE: /s/ Dr. Ojha

Dr. Ojha/lo

CONSULTATION REPORT:

(As discussed with Dr. Ojha on 11-10-88)

I am unable to see this patient on consultation—

per my supervisor—Dr. Richardson.

Please schedule as an outpatient.

SIGNATURE AND TITLE: /s/ D. Shaller DATE: 11-15-88

PATIENT:

Redaction: The original included patients name & hospital number

Consultation sheet

Standard form 513 (Rev. 9-77

MEDICAL RECORD CONSULTATION SHEET

TO: Chief Medical Service FROM: 5 East Bed 41 DATE: 11-30-88

REASON FOR REQUEST: (*Complaints and findings)*

RHEUMATOLOGY CONSULT: with Dr. Shaller: 66 YOWM presents with h/o arthritis and now has severe R hip pain with large swelling and induration of R gluteal area. Please evaluate for possible etiology. Lumbar spine series and R leg x-ray were seen as negative studies. Patient's R gluteal area is hot to touch, thank you.

PROVISIONAL DIAGNOSIS:

H/O Arthritis

DOCTOR'S SIGNATURE: Dr. Huskey/ly

CONSULTATION REPORT:

As per our discussion.
I am unable to see this patient on consultation—
per my supervisor—Dr. Richardson.
Please schedule as an outpatient.

SIGNATURE AND TITLE: /s/ Shaller DATE: 11-30-88

PATIENT:

Redaction: The original included patients name & hospital number

Consultation sheet
Standard form 513 (Rev. 9-77

MEDICAL RECORD CONSULTATION SHEET

TO: Chief Medical Service FROM: 5 East Bed 44 DATE: 11-29-88

REASON FOR REQUEST: (*Complaints and findings)*

Rheumatology Consult—65 year old white male with 3 months history of left knee pain with mild swelling of the knee joint. R/O DJD versus traumatic arthritis. Please evaluate and advise.

PROVISIONAL DIAGNOSIS:

AD R/O Rheumatoid arthritis, monoarticular

DOCTOR'S SIGNATURE: /s/ Dr. Banalagay

Dr. Banalagay-hk

CONSULTATION REPORT:

I am unable to see this patient on consultation—
per my supervisor—Dr. Richardson.
Please schedule as an outpatient.

SIGNATURE AND TITLE: /s/ Shaller DATE: 11-30-88

PATIENT:

Redaction: The original included patients name & hospital number

Consultation sheet
Standard form 513 (Rev. 9-77

December 16 1988

Dear Dr. Shaller:

Received letter dated Dec. 14 1988 cancelling another appointment. This is the fourth since my last appointment at the clinic if there is a reason or do you feel that there is nothing further you can medically do for me. I would appreciate a confirmation on this matter and if there is nothing further you feel you can do, Please prescribe something that I may take to help sleep at nights and maybe you can keep my next scheduled appointment.

Thank you.

Patient's name and number redacted.